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No. 06-1629

Supreme Court, U.S.
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In The

Supreme Court of the United States

THE HONORABLE RICHARD B. SANDERS,

Petitioner,

v.

THE WASHINGTON STATE COMMISSION ON JUDICIAL CONDUCT,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Washington

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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RESPONSE TO PETITIONER'S QUESTIONS PRESENTED

1. Judges Are Properly Held to an Enforceable Standard to Avoid the Appearance of Impropriety.

2. Canons 1 and 2(A) of the Washington Code of Judicial Conduct Are Not Vague or Unconstitutional.

3. Justice Sanders' First Amendment Rights Were Not Violated When He Was Disciplined for Meeting and Conversing With Incarcerated Sexual Predators Who Had Cases Pending Before Justice Sanders' Own Court.

4. The "One-Tier" Judicial Disciplinary System Does Not Violate Due Process Rights.

5. The Washington Commission's Rules Governing Discovery Afford Complete and Reasonable Discovery to Respondent Judges, and Justice Sanders had Full Benefit of those Rules and the Opportunity to Challenge the Hearing Panel for Cause.

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STATEMENT OF FACTS

In a letter dated December 17, 2002, Andre Young, a resident of the Special Commitment Center (hereinafter SCC) for people adjudicated to be Sexually Violent Predators, invited, on behalf of the African American Collective,[1] Justice Sanders and the other justices of the Washington State Supreme Court to visit the institution. At the time, Mr. Young had a case pending before the State Supreme Court. His expressed desire in the invitation was for the justices to "evaluate and calculate" the statute confining sexually violent predators at the SCC by conducting "an on-site tour of the facility [and] to converse with the residents and Staff." The manner in which the tour was proposed and its anticipated nature caused concerns for other justices that they shared with Justice Sanders. One justice, Mary Fairhurst, was immediately worried about "the appearance that a request was coming directly from the residents to the Supreme Court and to me specifically to tour the facilities and meet with them." Chief Justice Gerry Alexander noticed that the letter was signed by Andre Young, "a name that's known to us because of other litigation that this individual had before the Court." A third justice, Faith Ireland, on January 7, 2003, emailed her colleagues on the bench, that an appropriate tour should be set up by the superintendent of the facility, rather than dealing directly with the residents. The Chief Justice testified that he shared that concern.

On January 9, 2003, at the justices' monthly administrative meeting, they discussed the proposed tour. It was eventually decided that there was a way to conduct a visit

[1] A self-named association of residents of the SCC.

without causing concerns. In light of that decision, Justices Fairhurst and Ireland, both veterans of many institutional tours, expressed interest in participating in the visit. On January 10, 2003, Justice Ireland wrote the SCC Superintendent advising him she intended to join Justice Sanders on the tour and asked him to make plain to the residents that she was not there to evaluate the facility. She sent a copy of her letter to Justice Sanders and to Mr. Young.

Unknown to the other justices, Justice Sanders had received another letter directly from Andre Young dated January 9, 2003, thanking him for his "recent response accepting the African American Collective's invitation to visit" and to tour the SCC. Mr. Young's letter discussed at length the fact-finding the African American Collective was proposing for the visit. He attached copies of legal documents from a federal court action that included another resident, Ron Peterson, as a plaintiff. In his January 9, 2003 letter, Mr. Young suggested that Justice Sanders contact "opposing counsels" to be in attendance because "we do not want the appearance of partiality, nor are we about making ex parte legal actions and not otherwise informing the prosecution e.g. SCC Administration are renowned for their surreptitious adversarial/ prosecutorial actions towards us."

Justice Sanders had written two opinions in cases brought by Ron Petersen. Mr. Petersen had two matters pending in the Washington Supreme Court, wherein he raised the issue of "volitional control," conditions of confinement, and other issues. Justice Sanders acted on one of these matters while on Department One of the Court.

By letter dated January 13, 2003, Andre Young again wrote to Justice Sanders, outlining the tour the African

American Collective was proposing, including sites to be visited and naming residents who would serve as guides. One was resident Rickey Calhoun, who had an active petition for review in the Supreme Court at the time. Justice Sanders testified that he recalled receiving correspondence from Mr. Calhoun. Mr. Young also attached the Report of the Ombudsman, challenging the constitutional adequacy of the SCC, and documents from Mr. Peterson's matter pending in federal court.

"Red flags" went up for Chief Justice Alexander when he saw this letter because of Mr. Young's expectations for the tour. At that time, the Chief Justice talked to the other justices who were planning to visit the institution, including Justice Sanders, to express his concern and the apparent misapprehension the residents had about how the tour would be conducted. Although Chief Justice Alexander did not consider it his role to tell other justices what to do, he frankly advised Justice Sanders that he was "not going to be going and that [his] clerks would not be going, and that [he] was concerned that there may have been a misunderstanding on the part of Andre Brigham Young."

When Justice Fairhurst received a copy of Andre Young's January 13, 2003 letter, she, too, decided it would be imprudent to go on the tour. She wrote a memorandum to Justice Sanders on January 21, 2003, copied to the Chief and Justice Ireland, attaching a printout of 23 cases brought by Mr. Young, (not including current cases) to illustrate the reasons for her concerns.

Justice Ireland declined Justice Sanders' further preparatory invitation to meet with the former SCC Ombudsman "to provide background and stat[e] what [the Ombudsman's] position was," because she felt it would be

improper "ex parte contact" about complaints that would come to the Court in "some kind of a PRP [personal restraint petition]. . . ." On January 22, 2003, after receiving Andre Young's January 13, 2003 letter and attachments, Justice Ireland wrote the Superintendent of the SCC directly and announced her decision not to go. Justice Ireland sent copies to the other justices, citing the anticipated contact with residents because such "conversation with inmates could be construed as *ex parte* communication" due to the "volume of litigation the residents" had in the Supreme Court.

Justice Ireland had two different conversations with Justice Sanders warning him directly that the planned visit was imprudent, given the residents' expectations. She testified that in the second conversation about "whether the trip should be made and, again, in the same sort of thing across the table from one another where I said, 'Richard, don't do this,' and it was, you know, I was saying, making a warning statement to him, 'don't do this,' and, you know, 'this is a mistake' . . . " In addition, Justice Sanders' own law clerk who handled sexual violent predator (SVP) cases questioned him about the propriety of the visit as planned.

Two business days before the tour, the Superintendent faxed a letter to the Chief Justice, copied to Justice Sanders, suggesting that some of the residents whom Justice Sanders might contact " . . . have cases pending in the state court system" and inquiring if the Court wished the institution to follow any particular "protocol." Justice Sanders responded to the Superintendent (and copied the Chief) with his first letter showing any concern on his part that there should be limits on the tour he had arranged at the behest of the African American Collective. In a portion of that letter (not cited in his petition), Justice Sanders

told the Superintendent that his visits with the residents would be a "highlight" of the tour. In the end, Justice Sanders was the only justice to go on this tour, together with his own and several other law clerks from the Court.

Once at the SCC, Justice Sanders reiterated his desire to meet and speak with its residents. Although in his petition Justice Sanders correctly states that the staff "placed Justice Sanders in a conference room where he met with groups of residents," he did not note to this Court that the staff's testimony was that they did so *only* because of Justice Sanders' repeated requests to have conversations with the residents. SCC staff also testified that they had not set up such encounters with any other judge touring the facility in the past. Moreover, Justice Sanders' petition omits to mention that he accepted without question documents proffered him by two residents, removed them from the facility, and failed to disclose their existence or contents until required to do so.

Justice Sanders accurately recites how, in his letter to the Superintendent, he stated the need to set conversational limits in his meetings with the members of the SCC. Justice Sanders also accurately states how he told residents face to face not to discuss their cases lest he be required to recuse himself from related litigation. Nevertheless, despite the cautionary statements, Justice Sanders then immediately crossed the lines he had himself defined in his conversations with SCC members. As the residents introduced themselves, (many of whom had cases currently pending before the State Supreme Court), Justice Sanders initiated one-on-one conversations on their views of "the issue of volitional control," an issue central to a major case pending before his Court. He also asked them about facts crucial to decisions in many of

their individual cases. Even if not anticipated beforehand, the nature of these contacts far exceeded the appropriate conduct for judicial institutional visits.

Despite these interactions with litigants at the SCC, after returning from the tour Justice Sanders took no initiative to disclose to parties or their attorneys what conversations he had had with the litigants, nor did he disclose the documents that he had received from them. Although Justice Sanders did eventually recuse himself from the *Thorell* case (*In re Thorell*, 149 Wn.2d 724, 72 P.3d 709 (2003)), involving the SCC and the issue of volitional control, he did not do so until the State moved for his recusal and after Justice Sanders had sought and received an opinion from the state Ethics Advisory Committee that he was obliged to do so.

The facts in this case are largely uncontested and, for the most part, they are accurately set forth in the petition to this Court. There are, however, several significant omissions and at least one unsupported suggestion of malfeasance in the statement of facts offered in support of the petition to this Court. The Commission on Judicial Conduct has stressed, from the beginning of the instant disciplinary process, that it was not concerned with the bare fact that a judicial officer visited a state institution in which people are involuntarily detained. The pro tem State Supreme Court reiterated this point after *de novo* review. It is the context and circumstances of the visit and Justice Sanders' actions while there that form the gravamen for discipline.

REASONS TO DENY THE PETITION

Judges Are Properly Held to an Enforceable Standard to Avoid the Appearance of Impropriety.

The case before the Court presents a straightforward application of well-established principles of judicial ethics law. Justice Sanders' petition misstates the case as a vehicle for consideration of "decades-long conflicts in case law," and further misstates the Washington State Supreme Court decision as one "inconsistent with this Court's established precedent." Pet. for Cert. 8. The facts of this case do *not* present a clash between Justice Sanders' First Amendment rights and the judicial impropriety prohibited by the Code. Justice Sanders suggests that national judicial discipline jurisprudence is at a turning point in the application of the appearance of impropriety: it is not. At page 9 of his petition, Justice Sanders wrongly describes the Model Code recently adopted by the American Bar Association as containing "an expanded version of the appearance of impropriety standard [that] transforms it from a hortatory standard into a rule that is the basis for discipline." In the following footnote, the petition goes on to misstate that the "former CJC made clear that Canons 1 and 2 were aspirational, not mandatory." The petition urges this Court to accept certiorari to avoid a purported fundamental change in the application of the Code. At page 9 of his Petition, Justice Sanders misleadingly portrays the issue as it was discussed at the recent American Bar Association conference. At the ABA Convention in February 2007, an eleventh-hour effort was made to radically change the Model Code by making the appearance of impropriety unenforceable for the first time. This eleventh-hour attempt to undo years of precedence created serious consternation and resulted in the resignation of an advisory member of the Committee reviewing the Code as a protest

against the attempted undermining of the Model Code. In reaction to the attempt to make the appearance of impropriety unenforceable, the *New York Times* newspaper published a strongly worded editorial, and the national Conference of Chief Justices, among other organizations, passed a formal resolution opposing the abandonment of the standard. In the end, the ABA retained the appearance of impropriety as an enforceable standard. *See* Appendix A.

In the instant case, far from creating a new imposition on the rights of the judiciary, the Washington State Supreme Court's decision and that of the Commission created no new law and imposed no startling restrictions on a judge's rights or obligations. Rather, they simply reaffirmed a fundamental and non-controversial premise of judicial integrity: judges have an affirmative duty to be vigilant to guard against the appearance of impropriety in their role as neutral arbiters of disputes before them. *See, e.g., Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847 (1988). Determination of the appearance of impropriety in this case, as in *Liljeberg*, turns on a consideration of the facts. 486 U.S. at 852. Justice Sanders' petition urges this Court to misapprehend the history of the appearance of impropriety. At page 13 of his petition, Justice Sanders writes: "Prior to this case, there were no Washington cases finding a Canon 1 violation standing alone." The Commission made no such finding in this case or in any other. The Commission found Justice Sanders violated Canon 1 *and* Canon 2(A). Contrary to the statement in the petition at page eight, Canons 1 and 2(A) *have* historically been enforced absent a finding of a more specific code provision, as demonstrated in Washington and other states. *In re Votendahl*, 89-879-F-17 (1990), *In re Coughenour*, 91-1063-F-24 (1991), *In re Leverette*, 91-1118-F-26 (1991), *In re Perkins,* 93-1474-F-42 (1993), *In re Hatter,*

93-1445-F-46 (1994), *In re Mackin,* 94-1677-F-49 (1995), *In re Turco,* 97-2451-F-66 (1998), *In re Ritchie,* 91-1110-F-33 (1993), *In re Bridge,* 4050-F-106 (2003), *In re Vanderveen,* 4793-F-122 (2005), *In re White,* 4792-F-121 (2005) (all Washington cases can be viewed at the website: www.cjc.state.wa.us); and from other states, *In re Hill,* 8 S.W.3d 578 (Missouri 2000), *In re Schenck*, 318 Ore. 402, 870 P.2d 185 (1994), *In the Matter of Pastrick*, New York, August 2005 (can be viewed at the website: http://www.scjc.state.ny.us/). *See* Appendix B for a law review article discussing many such cases from around the country: Cynthia Gray, *Avoiding the Appearance of Impropriety: With Great Power Comes Great Responsibility*, 28 U. Ark. Little Rock L. Rev. 64 (2005).

The Commission was required, in this case and in others that have (and will) come before it, to apply the Canons of Judicial Conduct to the manner in which judges conduct themselves, so as to insure the integrity and independence of the judiciary and the public's faith in it. Definitions and standards for conduct are developed in the context of particular factual situations. Canons 1 and 2, in particular, address the ethical aspirations expressed by the Code of Judicial Conduct. Although Justice Sanders suggests that the Canons have no independent validity, they are critical to the constitutional mandate of the Commission. The Code is not a criminal code with specific elements noted for every potential judicial transgression, but a largely aspirational document, directing judges to achieve and maintain standards of behavior. As stated in the last sentence of the Preamble, "[t]he Code is intended . . . to state basic standards which should govern the conduct of judges and to provide guidance to assist judges in establishing and maintaining high standards of judicial and personal conduct." It is to be applied with a rule of reason, to be

interpreted in the light of experience, not only to maintain the actuality of judicial propriety but also the appearance of propriety. The goal is to maintain citizens' confidence in the independence and integrity of the judiciary. This is one of the reasons why non-law-trained members sit on the Commission and apply their experience and common sense along with other members who are judges and lawyers. In part, because the Code is aspirational and general, and not Napoleonic, an understanding of the specific facts of a case is essential to the Commission's charge.

Canons 1 and 2(A) of the Washington Code of Judicial Conduct Are Not Vague or Unconstitutional.

The argument that Canons 1 and 2(A) are unconstitutionally vague as applied to the facts in this case was raised by Justice Sanders before the Washington Supreme Court in its *de novo* review of this matter. The Commission adopts by reference the holding and the reasoning of the Washington Supreme Court in rejecting the argument. *In re Sanders*, 159 Wn.2d 517, 523-26, 145 P.3d 1208, 1211-13 (2006) (*Sanders II*) (Appendix A to Petition, pp. 6a-8a). The Washington Supreme Court considered the same claim that Canons 1 and 2(A) are too vague – more than a decade ago – and refuted it in *In re Ritchie*, 123 Wn.2d 725, 735, 870 P.2d 967, 972 (1994). The *Sanders II* court, (composed of many of the same pro tem justices who decided Justice Sanders' earlier case before the Commission, *In re Sanders*, 135 Wn.2d 175, 955 P.2d 369 (1998) (*Sanders I*), including the primary author of *Sanders II*) specifically contrasted the facts in *Sanders II* with its analysis in *Sanders I*, noting that *Sanders I* squarely presented the balancing of the justice's First Amendment rights against the Code of Judicial Conduct, whereas the facts in the instant case did not.

General disciplinary rules are inherent in various codes of conduct for professionals, and reflect the responsibility that such professionals owe to the public who rely upon them. Such general rules are essential because it would be impossible to codify every conceivable act that would be deemed to be improper. The entire body of the Code of Judicial Conduct is directed by the premier and compelling ethical precepts governing a judge's behavior articulated in Canons 1 and 2(A) – the obligation to uphold and promote public confidence in the integrity, independence and impartiality of the judiciary, and to avoid even the appearance of impropriety.

In a passage apposite to Justice Sanders' claim that the canons at issue are void for vagueness, this Court in *Arnett v. Kennedy*, 416 U.S. 134 (1974), specifically addressed the efficacy of a conduct code that gave fair notice of disciplinable behavior without having to spell out in detail every conceivable factual possibility. In *Arnett*, this Court upheld the term "for cause" against a vagueness challenge in relation to the discharge of a federal employee. Quoting from the Court's earlier decision in *Civil Service Comm'n v. Nat'l Ass'n of Letter Carriers*, 413 U.S. 548 (1973), the Court stated: "There are limitations in the English language with respect to being both specific and manageably brief, and it seems to us that although the prohibitions may not satisfy those intent on finding fault at any cost, they are set out in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with, without sacrifice to the public interest." 416 U.S. at 159, quoting from 413 U.S. at 578-79.

The essential fairness of this broad and general removal standard, and the impracticability of greater specificity, were recognized by Judge Leventhal, writing

for a panel of the United States Court of Appeals for the District of Columbia Circuit in *Meehan v. Macy,* 129 U.S. App. D.C. 217, 230, 392 F.2d 822, 835 (1968), aff'd *en banc*, 138 U.S. App. D.C. 41, 425 F.2d 472 (1969): "[I]t is not feasible or necessary for the Government to spell out in detail all that conduct which will result in retaliation. The most conscientious of codes that define prohibited conduct of employees includes 'catch-all' clauses prohibiting employee 'misconduct,' 'immorality,' or 'conduct unbecoming.'"

Justice Sanders takes the remarkable position that Canons 1 and 2 serve no compelling state interest, and he urges this Court to find Canons 1 and 2, the core of the Code of Judicial Conduct, unenforceable in the name of free speech. He argues this based on facts that offer no harbor for such argument. He places the issue before this tribunal (in more than passing reference) for the first time over the course of exhaustive litigation. He asks this Court to find that his First Amendment rights have been chilled because, in the absence of an independent basis for finding a violation of the Code of Judicial Conduct, Canon 1 is merely "hortatory." This argument was only obliquely noted to the Commission and to the Washington State Supreme Court in the lengthy course of this litigation. The record contains no argument of this issue applied to the facts of the case. Consequently, because it was never squarely brought up by Justice Sanders before the Commission or the highest court in Washington State, they have not even addressed the fundamental federal question Justice Sanders asks this court to decide. Justice Sanders has, essentially, based his contention in *this matter* on his *first* disciplinary proceeding, *Sanders I,* in which the Washington Supreme Court tipped the scales in favor of political free speech in a fact pattern that was appropriate to that issue.

Essentially, the factual support for Justice Sanders' contention that he was disciplined for exercising free speech rests merely on his assertion that it was so. However, the *mere assertion* that Justice Sanders was engaged in exercising constitutionally protected speech in the case at bar does not make it so.

Justice Sanders' First Amendment Rights Were Not Violated When He Was Disciplined for Meeting and Conversing With Incarcerated Sexual Predators Who Had Cases Pending Before Justice Sanders' Own Court.

This Court may one day be presented with a case highlighting the tensions between a judge's First Amendment rights and the restrictions imposed by the Code of Judicial Conduct. However, this is not that case.

The United States Supreme Court has previously ruled that candidates for judicial office do not surrender their First Amendment right to "vigorously and tirelessly advocate [their] own election." *Buckley v. Valeo*, 424 U.S. 1, 52 (1976). Likewise, the Washington Supreme Court, in *Sanders I*, also favored free speech over judicial discipline in the context of Justice Sanders addressing a political rally in the state capital. *Sanders I*, 135 Wn.2d 175. (Note – pro tem State Supreme Court Justice C. Kenneth Grosse authored the opinions in both *Sanders I* and *Sanders II*). The essence of protected speech, of course, is not just whether it is "political" – for, as the Washington Supreme Court recognized in *Sanders I*, at pp. 186-89, that is impossible to determine – but the *context* of the speech that is alleged to be protected. "[T]he character of every act depends upon the circumstances in which it is done." *Aikens v. Wisconsin*, 195 U.S. 194, 205-06 (1904).

Thus, the question before the Washington State Supreme Court was whether Justice Sanders was engaged in conduct that *should* be constitutionally protected under the First Amendment when he met, conversed with and accepted documents from institutionalized litigants, at their invitation, who had cases pending before the very court on which Justice Sanders sits. There are three principal reasons why Justice Sanders' conduct was not constitutionally protected.

First, it is essential that judges be held to a high standard of impartiality, and that, in certain circumstances like these, decisions about personal conduct yield to the institutional integrity of the judicial system. *In re Turco,* 137 Wn.2d 227, 970 P.2d 731 (1999) (judge struck his wife in a public venue) the Washington Supreme Court held that Canons 1 and 2(A) of the Code govern even extra-judicial conduct because " . . . the public invests judges with particular esteem. We must meet a higher standard of behavior." The Court surveyed decisions from other jurisdictions, all agreeing, that a judge " . . . is a standard-bearer of fairness and impartiality in our society. . . ." *Id.* at 243. (Citations omitted.)

Second, precisely because a judge is a standard-bearer of fairness and impartiality, appearances take on particular importance especially in the context of a matter that is actually pending before that judge. Thus, when Justice Sanders visited, conversed with and accepted documents from incarcerated sex predators who were litigants before Justice Sanders' own court, he was involved in far more than spontaneous social intercourse with members of the general public. His contact was specially related to the pending litigation and the nature of the contact related to

pending legal issues. The Commission, acting conservatively, did not go so far as to find that Justice Sanders expressly engaged in *ex parte* communication on these facts. The Commission presumably accepted Justice Sanders' parsing of the "volitional control" issue as a jury question; or the Commission may have accepted Justice Sanders' representation that he did not, in fact, "consider" the conversations he initiated in working on the case. It would be difficult, however, to describe a scenario that might give a worse *appearance* of *ex parte* communication.

According to the logic Justice Sanders urges this Court to adopt, if his conduct was constitutionally protected speech, then so would be the most overtly *ex parte* communication or investigation in any pending case. It was no more appropriate for Justice Sanders, outside the courthouse, to meet with litigants and to discuss issues that bore on pending issues before his court, than it would have been appropriate for members of the Washington Supreme Court, after oral argument and prior to issuing a decision in this case, to accept an invitation to go to the Commission office and to meet with members of the Commission on Judicial Conduct, discuss their views of the meaning of "pending litigation" and accept without question or limitation documents from members of the Commission.

No one seeks to impose what Justice Sanders calls "judicial monasticism," just common sense and the necessary basic protocols of impartiality that robes of judgeship require. The problem is not necessarily whether Justice Sanders' actual contact and conversation with litigants, and the personal receipt of documents from them would affect his own decision (a proposition nearly impossible to

prove absent an admission); the problem is precisely the *appearance* of partiality.

Third, although Justice Sanders has couched his First Amendment arguments in terms of his right to engage the public on the issues, the "issues" and his "public" in this case were very special: incarcerated sexual predators with litigation pending before the Justice's court relating to their conviction and incarceration as sexual predators – the topics of his conversations with them. By comparison, in *Buckley,* 424 U.S. 1, the case related to a judge's right to present issues to the public that were pertinent to the judge's election campaign for public office. Similarly, in *Sanders I*, the issues before the Washington Supreme Court related to the judge's right to appear and briefly address a public political rally and to thank those present for support in his election, having walked there directly from his swearing-in ceremony.

In stark contrast, the incarcerated sexual predators at the McNeil Island Penitentiary were felons who had no right to vote in judicial or any other elections. Presumably, the right to engage with the public on matters of public concern relates to the public's ability to exercise its own political rights. But that cannot be camouflage for Justice Sanders' receiving documents from disenfranchised felons, seeking out and engaging in extended personal conversations with them, and introducing topics of conversation at issue in their cases then pending before his court.

The "One-Tier" Judicial Disciplinary System Does Not Violate Due Process Rights.

Justice Sanders argues that he was denied procedural due process because the Washington State Constitution

provides for a one-tier structure for the Washington State Commission on Judicial Conduct. In Article IV, §31 of the Washington State Constitution, the people of Washington conferred upon the Commission the dual obligations of investigating and adjudicating allegations of judicial misconduct. The Commission's investigators conduct preliminary, confidential investigations, and report directly to the Commission members. If the Commission finds the preliminary evidence sufficient and reliable enough to authorize a statement of charges and initiate public proceedings, the Commission thereafter bifurcates from the staff and disciplinary counsel who are conducting prosecutorial functions in the case. CJC Members' Policy 4.5(a). (Members' Policies can be viewed at the Commission's website, www.cjc.state.wa.us.) At that point, the Commission members are relieved of all materials relative to the case that were previously submitted to them. Although the rules do not prohibit it, the practice of the Commission members is to avoid meeting in person or by telephone with disciplinary counsel prior to the filing of a statement of charges, as happened in this case. (CJC Record of Proceedings, P-44, Exhibit 2.)

The "one-tier" system has been upheld against constitutional challenge in every forum in the country where it has been litigated, including Washington State. *See, e.g., In re Deming*, 108 Wn. 2d 82, 736 P.2d 639 (1987), *In re Zoarski*, 227 Conn. 784, 632 A.2d 1114 (1993), *In re Schenck*, 318 Ore. 402, 870 P.2d 185 (1994), *In re O'Dea*, 159 Vt. 590, 622 A.2d 507 (1993), *Adams v. Commission on Judicial Performance*, 10 Cal. 4th 866, 42 Cal. Rptr.2d 606, 897 P.2d 544 (1995), *In the Matter of Vaughn*, 265 Ga. 843, 462 S.E.2d 728 (1995), *Commission on Judicial Performance v. Russell*, 691 So. 2d 929 (Miss. 1997), *In re*

Bowers, 721 So. 2d 875 (La. 1998), *In the Matter of Flournoy*, 195 Ariz. 441, 990 P.2d 642 (1999), *In re Holien*, 612 N.W.2d 789 (Iowa 2000), *Mosley v. Nev. Comm'n on Judicial Discipline*, 117 Nev. 371, 22 P.3d 655 (2001).

In his petition, Justice Sanders has very loosely defined his out-of-court conversations with litigant felons as "meeting with the public and discussing issues of public concern." Pet. for Cert. 19. His tendency to paint in broad terms is similar to his broad brush attack on the so-called "one-tier" system of judicial discipline. Indeed, the system is not "one-tier" nor unconstitutional nor "stacked" to the judge's disadvantage.

Unlike the customary trial where the facts are determined and only the law is reviewed on appeal, the entire process of the Washington Commission on Judicial Conduct is subject to *de novo* review by the highest court in the state, the nine justices of the Washington Supreme Court. Any judge disciplined by the Commission on Judicial Conduct, no matter how light the discipline (as in the instant case), has the right to demand that the law and the facts be reviewed *de novo*. Washington State Constitution Article IV, §31, Clause 6; Commission on Judicial Conduct Rule of Procedure 25. When misconduct is substantiated the Commission on Judicial Conduct is in effect an *advisory body* because it is the Washington Supreme Court itself, not bound to any of the Commission's findings or conclusions, that is the final arbiter of judicial discipline. In that respect, notwithstanding the label "one-tier," the Washington State system of judicial discipline is, indeed, a two-tier system with the ultimate guarantor of the system's own impartiality being the State Supreme Court itself. The feature of *de novo* review by the highest

state court has satisfied due process concerns in every forum where it has been contested.[2]

The cases cited by petitioner at pages 27 and 28 of his petition are inapposite. The medical administrative discipline scheme disapproved in Pennsylvania lacked meaningful court review. *Lyness v. Comm., State Bd. of Medicine*, 529 Pa. 535, 547, 605 A.2d 1204, 1210 (1992). In the Nevada case cited by petitioner, the Nevada Supreme Court's disapproval of its state's attorney discipline process was premised largely on the discipline system's conflicts of interest: disciplinary fines were a crucial source of revenue for the State Bar, *In re Ross*, 99 Nev. 1, 12, 656 P.2d 832, 839 (1983) and the adjudicators under the Nevada system were the Bar Board of Governors, who were also responsible for the financial integrity of the bar. *Ross*, 656 P.2d at 840. Neither the lack of plenary review seen in Pennsylvania nor conflicts of interest in Nevada are present in the Washington State system.

Nor is the structure of the Commission on Judicial Conduct prejudicial to Justice Sanders. Washington's constitution, Article IV, §31, mandates that the commission consist of eleven persons including a mix of lay,

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[2] *See, e.g., In re Hanson*, 532 P.2d 303 (Alaska 1975), *Flournoy*, 195 Ariz. 441, *Adams*, 10 Cal.4th 866, *In re Zoarski*, 227 Conn. 784, *In re Kelly*, 238 So. 2d 565 (Florida 1970), *Vaughn*, 265 Ga. 843, *Holien*, 612 N.W.2d 789, *In re Rome*, 218 Kan. 198, 542 P.2d 676 (1975), *Bowers*, 721 So. 2d 875, *In re Diener*, 268 Md. 659, 304 A.2d 587 (1973), *In re Chrzanowski*, 465 Mich. 468, 636 N.W.2d 758 (2001), *Russell*, 691 So. 2d 929, *In re Elliston*, 789 S.W.2d 469 (Missouri 1990), *Mosley*, 117 Nev. 371, *Friedman v. State of New York*, 24 N.Y.2d 528, 249 N.E.2d 369 (1969), *In re Nowell*, 293 N.C. 235, 237 S.E.2d 246 (1977), *Schenck*, 318 Ore. 402, *In re Pirraglia* (Rhode Island Supreme Court February 28, 2007), *In re Brown*, 512 S.W.2d 317 (Texas 1974), *O'Dea*, 159 Vt. 590, *Deming*, 108 Wn.2d 82.

lawyer and judge representatives appointed by the state governor, the state bar association and various judicial organizations. It is a highly balanced body that encompasses multiple interests to safeguard the independence and integrity of the judiciary.

Purely from the perspective of sound policy, a commission like that mandated in Washington State, as a "one-tier" system, has the ability and experience to quickly and objectively investigate accusations of judicial misconduct. This serves the public, which has a high interest in having such accusations quickly dismissed or quickly brought to resolution. It also serves the interests of the judges so accused for the identical reasons that baseless accusations can quickly be dismissed or brought to resolution. The Constitution requires the Commission to conduct its own independent investigation of facts alleged in a complaint and to make its own independent analysis of whether there is probable cause that the Code of Judicial Conduct has been violated. (WA. State Constitution Article IV, Section 31). The vast majority of complaints received by the Commission on Judicial Conduct, about 96%, are dismissed after preliminary investigation. The Commission that considers the body of complaints brought before it becomes most experienced in this specialized area of law and facts, and is particularly well-informed in considering the few cases that are found to have probable cause to proceed.

The Washington State system for judicial discipline is not truly "one-tier," it has ample safeguards inherent in its policy of *de novo* review by the Washington Supreme Court, it is a broadly representative body, and, in the interests of the public and the judges, it has the experience, flexibility and speed to quickly deal with both legitimate and baseless complaints. These considerations

probably underlie the fact that the majority of states, 34, have systems that might be described, as Washington's, as "one-tier." Nothing whatsoever suggests that the system deprived Justice Sanders of his procedural due process rights.

The Washington Commission's Rules Governing Discovery Afford Complete and Reasonable Discovery to Respondent Judges, and Justice Sanders had Full Benefit of those Rules and Opportunity to Challenge the Hearing Panel for Cause.

As found by the Washington State Supreme Court in this case, Justice Sanders had full access to discovery in this case and "there is no basis to find that Justice Sanders was denied due process." *Sanders II*, 159 Wn.2d at 526. Pursuant to the Commission's Rules of Procedure (*see* website: www.cjc.state.wa.us), Justice Sanders received all of the documents and materials that formed the basis of the Commission's finding of probable cause. He had a list of all the witnesses called by the Commission, his attorney deposed many of them, and questioned all of them. Disciplinary Counsel provided him copies of all the written materials sought to be offered. This is a case where few, if any, of the facts alleged were in dispute and where the State Supreme Court reviewed the law and facts *de novo*. This is a case where Justice Sanders defended his actions by arguing that the Commission misapplied the Code to virtually uncontroverted facts.

In footnote 6 to his petition at pages 6-7, Justice Sanders acknowledges Commission rules that require disclosure and discovery be provided to respondent judges. Although the footnote states correctly that depositions require either stipulation of disciplinary counsel or the

order of the presiding officer, the footnote concludes somewhat misleadingly by noting "Discovery disputes are decided by the Commission and are not appealable prior to the final order." Although CJCRP 22(b)(3) in fact so states, Justice Sanders nonetheless sought and obtained interlocutory appeal to the State Supreme Court on disputed discovery issues in this case, which were considered and denied. (CJC Record of Proceedings, S-47.) At the petition on page 29, Justice Sanders makes a similarly misleading statement regarding discovery: "There is no discovery without disciplinary counsel or its consent." Although the meaning of that sentence is unclear, if it is intended to convey that disciplinary counsel has full control over discovery demands, that is patently untrue under the Commission's rules. Indeed, in the context of this particular case some of Justice Sanders' disputed discovery demands *were* granted over the objection of disciplinary counsel. (CJC Record of Proceedings, D-45.)

Justice Sanders does not seriously argue that his access to relevant witnesses or materials was actually impeded, stating to this Court: "In resolving this case, this Court does not need to delve into the details of discovery requests." Pet. for Cert. 30. His arguments to this Court specifically focus, rather, on his attempts to receive the full investigatory file on the possibility that *something* in there (beyond materials that led to a finding of probable cause or that would tend to negate such a finding, which were provided to him under CJCRP 17(d)(4)(c) and CJCRP 22(a)(1)) *might* have biased the Commission members against him.

Justice Sanders moved in discovery to interrogate disciplinary counsel. Most extraordinarily, Justice Sanders demanded the right to depose members of the Commission

fact-finding panel to delve into their minds on a purely speculative basis. (CJC Record of Proceedings, D-4.) There is no more basis for this extraordinary demand than there is for a litigant to be permitted to depose a judge or justice, without good cause, to troll for possible bias. The Commission's internal rules require members to recuse themselves from participating at any point in cases where they might have a conflict of interest. Under CJCRP 3(e), members are required to disqualify themselves where their impartiality "might reasonably be questioned." Under CJCRP 3(e)(3), respondent judges may challenge any member of the Commission for cause. If the challenged Commission member does not agree to recuse him or herself when challenged, the Chair of the Commission will make the final determination regarding recusal. Under Members' Policy 5.1(a), members are required to recuse themselves when "they cannot participate in a fair and reasonable manner or where their ability to do so might reasonably be questioned." (Nonexclusive examples of situations requiring recusal are provided in the policy. *See* website: www.cjc.state.wa.us.)

In his petition, Justice Sanders has darkly hinted that there was improper *ex parte* communication between staff and disciplinary counsel on the one hand, and the fact-finding hearing panel on the other, after the filing of a public Statement of Charges prohibits such contact. *See* footnote 3, page 6 of the petition. There is no reference in the record and absolutely no basis in fact for such an insinuation. Despite the warnings of his colleagues on the Washington Supreme Court, despite the testimony of witnesses present at the Special Commitment Center, despite the ruling of the Commission and the unanimous decision of the State Supreme Court on *de novo* review of

the facts and law, Justice Sanders has chosen to characterize this case as the product of an unjust imposition on his personal rights rather than an appropriate effort to preserve the appearance of integrity and impartiality in Washington's judicial system. The admonishment received by Justice Sanders is defined in the CJCRP terminology section as "a written action of the commission of an advisory nature that cautions a respondent not to engage in certain proscribed behavior. An admonishment may include a requirement that the respondent follow a specified corrective course of action. Admonishment is the least severe disciplinary action the commission can issue."[3]

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[3] U.S. Supreme Court Rule 15(2) states in part that "Counsel are admonished that they have an obligation to the Court to point out in the brief in opposition, and not later, any perceived misstatement made in the petition." Accordingly, we note that at page 30 of his petition, Justice Sanders alleges in the first full paragraph that "Commission members were not only aware of possible settlement discussions, but directed them to occur." This is not true. Disciplinary Counsel and Respondent's counsel asked the Commission members, prior to a finding of probable cause in the case, to delay the process to allow time to explore a possible agreed resolution of the case. The members played no role in actual negotiation. It is untrue that they "directed them to occur." The Commission's disciplinary counsel did not "meet with its Executive Director to discuss such negotiations." It is unknown why Justice Sanders states that she did. The statement in that same paragraph that "The Commission asked for and received legal briefings from staff regarding the potential charges it was being asked to file against Justice Sanders" implies the Commission did something improper in considering legal analysis from its own staff as it considered whether to formally bring a matter against a judge. It would be inexcusably remiss if the Commission did *not* consider law in the area of potential charges before addressing concerns to a judge.

CONCLUSION

This is a case in which the Washington State Supreme Court affirmed a restrained and straightforward application of established Canons by the Washington State Commission on Judicial Conduct. The Commission imposed a modest form of discipline appropriate to the facts, and the Washington Supreme Court affirmed that it was appropriate. Justice Sanders' due process and other constitutional rights were neither chilled nor impinged as both the Commission and the Washington State Supreme Court strove to preserve a simple but essential concept of justice: the need for a judge to avoid the appearance of bias and improper *ex parte* communication with parties in a case currently pending before his court. One day there might be a case brought before this Court which presents a serious weighing of First Amendment rights and the appearance of judicial impartiality. This is not that case. The Commission on Judicial Conduct respectfully submits that certiorari should be denied.

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APPENDIX A – Letter of Resignation from the ABA Committee to Evaluate the Model Code; Resolution of Conference of Chief Justices Regarding Appearance of Impropriety; *New York Times* Editorial Regarding Same

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February 3, 2007

Mark I. Harrison, Chair
ABA Joint Commission to Evaluate the
Model Code of Judicial Conduct
c/o Osborn Maledon, P.A.
2929 North Central Avenue, Suite 2100
Phoenix Arizona 85012-2794

Dear Mark:

With regret, I hereby resign from the Advisory Commission to the ABA Joint Commission to Evaluate the Model Code of Judicial Conduct.

I have high regard for you and all my colleagues in this project. I appreciate the hard work that went into producing the document, which the ABA House of Delegates will likely adopt within the next week or so. There are many improvements in the proposed Model Code that I

support, and for the most part, I can accept even those changes with which I happen to disagree.[1]

However, I cannot on principle endorse this proposed Model Code because I believe the Commission has inflicted serious injury on an indispensable Canon: the obligation of a judge to "avoid impropriety and the appearance of impropriety." I also object to the opaque way this was done.

The Preamble to the current Code declares that the Canons and Rules are "binding" on judges. After three years of public hearings, debate, feedback and compromise, the Commission reaffirmed that the Canons are mandatory and that a judge can be disciplined for violating them. This appears in the Scope section of its Report to the House of Delegates as posted on the ABA website in October 2006.

Now, however, just days before the ABA is to take up the Model Code, the Commission has privately amended the Scope, declaring that the Canons merely provide "guidance" and that "only" the Rules are enforceable. So far as I know, this new language is not posted or readily available.

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[1] In a wide-ranging project such as this, not every change will have every participant's support. I, for example, would have preferred greater limitations on judges whose travel and seminar attendance is underwritten by special interest groups. Others would have further relaxed the political-activity constraints on judges. For the most part, however, Commissioners and Advisors worked out their honest differences and made valuable improvements, such as making it easier for judges to help their substance-impaired colleagues, and extending the anti-discrimination provisions to include gays and lesbians.

Since the obligation to "avoid impropriety and the appearance of impropriety" is articulated in a Canon but not a Rule, the Commission's new formulation effectively nullifies it as an enforceable standard of judicial ethics. This is a monumental mistake.

Judges are public officials, performing a unique and vital role in our constitutional democracy. Their independence and integrity must be beyond reproach for the public to have faith in the administration of justice. At a time when the ABA is defending judicial independence from relentless attack, I cannot imagine that either the judiciary or the public will applaud the ABA for relegating the "impropriety and appearance of impropriety" standard to a virtually meaningless phrase that could not even be enforced in conjunction with some other ethics provision. Indeed, when the Commission first floated such an idea in May 2004, it wisely backed down after widespread editorial and civic rebuke. This backstage last-minute revival of a bad idea is disconcerting and mystifying.

There is no evidence that the "impropriety and appearance of impropriety" standard has been misused by either judicial disciplinary bodies or the state high courts that enforce judicial ethics. The due process of law applies to judicial disciplinary proceedings as readily as it applies to civil litigation and criminal prosecutions. No judge is charged or disciplined for violating a Canon without pleadings that allege specific facts on which the ethical violation is based. The "impropriety and appearance of impropriety" Canon has a substantial history. The phrase itself has meaning and application beyond the merely advisory. It has been part of judicial disciplinary jurisprudence for decades and should not be abandoned so cavalierly.

As far back as 1924, in the Canons of Judicial Ethics, the ABA has unequivocally declared that judges should avoid impropriety and the appearance of impropriety. In the 1972 Code of Judicial Conduct, the ABA elevated this concept into a Canon of its own. In the 1990 Model Code of Judicial Conduct, the ABA enhanced it further, explicitly making the Canons mandatory and declaring that judges "shall" avoid impropriety and the appearance of impropriety. In short, every time the ABA addressed this standard, it was strengthened. Until now.

I understand the Commission acted in order to accommodate certain committees of the ABA which indicated they would not support the Model Code otherwise. However, this Code is not intended for the Commission, or individual ABA committees, or the ABA itself. This code of conduct is intended to guide and govern the judiciary and to enhance public confidence in the judiciary.

It was my hope the Commission would lead, not sacrifice a fundamental principle of judicial ethics in private to gain the co-sponsorship of certain committees, long after others made their arguments in public. Ironically, this last-minute change by the Commission would put the ABA in conflict with the vast majority of states that have been enforcing the "impropriety and appearance of impropriety" standard for decades. It would undermine the vast majority of judicial advisory committees that have been invoking this standard in order to guide judges and keep them out of ethical trouble. It would be inconsistent with the code of conduct for federal judges, which in this respect goes beyond the existing ABA Model Code and defines the "appearance of impropriety." It would also be inconsistent with the ABA's own history. Whatever advances

the rest of the proposed Model Code may make, it is this regrettable setback for which it will be known.

At this point, I would suggest a Model Code that simply states, "The Canons and Rules are mandatory and a judge may be disciplined for violating them."

Notwithstanding my resignation, I appreciate the opportunity to have served, and I look forward to other occasions for us to get together.

Sincerely,

/s/ Bob
Robert H. Tembeckjian

CONFERENCE OF CHIEF JUSTICES

Resolution 3

Opposing the Report of the ABA Joint Commission to Evaluate the Model Code of Judicial Conduct in Light of its Failure to Provide for Enforceability of the Canon on "Appearance of Impropriety"

WHEREAS, in July 2003 the American Bar Association created a Joint Commission to Evaluate The Model Code of Judicial Conduct which operated under the auspices of the ABA Standing Committees on Ethics and Professional Responsibility and on Judicial Independence; and

WHEREAS, the Joint Commission's process has been extensive and open, and the chair and members of the Joint Commission have met on numerous occasions with work groups and committees of the Conference of Chief Justices to report on the work of the Commission and to seek insight and feedback from members of the Conference; and

WHEREAS, the Joint Commission's Report evidenced a careful evaluation of the Model Code based upon the extensive collective experience of judges with the existing Code and addresses specific questions stemming from new issues in the judicial selection process, the development of new types of courts and the increasing frequency of self-represented litigants in courts; and

WHEREAS, the American Bar Association House of Delegates will consider the Report at the upcoming 2007 ABA Midyear Meeting; and

WHEREAS, once the House of Delegates has approved a revised version of the Model Code, the merits of the

final recommendations of the ABA will be ripe for consideration by the highest court of each jurisdiction;

NOW, THEREFORE, BE IT RESOLVED that the Conference of Chief Justices opposes any revised version of the Model Code of Judicial Conduct that does not include a provision requiring avoidance of impropriety and the appearance of impropriety both as an aspirational goal for judges and as a basis for disciplinary enforcement; and

FURTHER, BE IT RESOLVED that without speaking to the merits of any of the other revisions proposed by the Joint Commission, the Conference of Chief Justices respectfully encourages the House of Delegates to amend the proposed revised Code as described above, and if so amended, to act expeditiously in its consideration of the Joint Commission's Report and Recommendations, at which time the Conference can commend to its members the revisions as a foundation upon which states can build to improve and clarify the standards of conduct for the judiciary.

Adopted as proposed by the Professionalism and Competence of the Bar Committee of the Conference of Chief Justices on February 7, 2007.

The New York Times

February 9, 2007
EDITORIAL

The A.B.A.'s Judicial Ethics Mess

At a moment when judicial independence is under heightened political attack, the nation's legal establishment should be doing everything it can to shore up public trust. Instead, the special commission charged with recommending revisions to the Model Code of Judicial Conduct of the American Bar Association has been flip-flopping around on some of the most important aspects of the code, which the states use to set standards for their courts.

For decades, the code's overarching charge to judges has been to avoid not only actual impropriety, but also the appearance of impropriety. Recently, however, quietly adopted changes to the commission's "final" report demoted this gold standard of judicial conduct from an enforceable rule to a mere aspirational guideline.

When the misguided switch came to light, the panel reversed field again yesterday and went back to the previous formulation. But that does not excuse the fact that the panel was following internal politics, not sound legal principle. The change might have eluded public attention if Robert Tembeckjian, the administrator of the New York State Commission on Judicial Conduct, had not protested and Adam Liptak had not reported on the matter in The Times this week.

Mark Harrison, chairman of the flailing ethics panel, claimed just days ago that the "appearance of impropriety" standard was vague and unfair. But judges interpret rules like that all the time, and the Conference of Chief Justices,

made up of top state judges, unanimously endorsed the appearance of impropriety as a basis for disciplinary enforcement.

Despite yesterday's news, the proposed code revisions have serious deficiencies. They fall well short of ending the festering scandal of expense-paid judicial seminars that are held at desirable resorts and underwritten by private interests. If the House of Delegates lacks the resolve to ban these junkets, it should at least limit reimbursements for accompanying spouses. There should be no free rides or free lunches (or breakfasts or dinners).

The rules on when a judge must bow out of hearing cases also need work. At the federal level, judges must recuse themselves when they have any financial interest raising a potential conflict. That is far preferable to the model code's approach of letting state judges decide for themselves whether their financial conflict is minimal enough to stay on a case.

There is a real danger in relying on this commission's judgment. Members of the A.B.A.'s House of Delegates are supposed to vote on the new code next week in Miami. Their wisest course would be to defer the issue, at least until the group's next meeting in August. In the meantime, the president of the bar should appoint an independent committee of experts to review all of the provisions and make their own assessment of what is really needed.

APPENDIX B

AVOIDING THE APPEARANCE OF IMPROPRIETY: WITH GREAT POWER COMES GREAT RESPONSIBILITY

[Article from 28 U. Ark. Little Rock L. Rev. 64 (2005)]

*Cynthia Gray**

I. INTRODUCTION

If a judge tells a police officer who stopped him for a traffic offense that his arrest is unnecessary because "we need each other," the judge clearly violates the proscription on using the prestige of judicial office to advance the

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* Since October 1990, Cindy has been director of the American Judicature Society's Center for Judicial Ethics, a national clearinghouse for information about judicial ethics and discipline. She summarizes recent cases and advisory opinions, answers requests for information about judicial conduct, writes and edits the *Judicial Conduct Reporter,* and directs the Center's day-to-day activities and special projects. She has made numerous presentations at judicial education programs on judicial ethics topics. Most recently, she is author of *Reaching Out of Overreaching: Judicial Ethics and Self-Represented Litigants, "The Line Between Legal Error and Judicial Misconduct: Balancing Judicial Independence and Accountability," Hofstra Law Review* (Summer 2004), and *Ethics and Judges' Evolving Roles Off the Bench: Service on Governmental Commissions, A Study of Judicial Discipline Sanctions.* She has also written *An Ethics Guide for Judges and Their Families* and the related discussion guide; *When Judges Speak Up: Ethics, the Public, and the Media; An Ethics Guide for Part-Time Lawyer Judges; Communicating with Voters: Ethics and Judicial Campaign Speech; Ethics Training for Non-Lawyer Judges; the Handbook for Judicial Conduct Commission Members*; and eight background papers on key issues in judicial ethics. She is also co-author of the *Judicial Conduct and Ethics Curriculum.* A 1980 graduate of the Northwestern University School of Law, Cindy clerked for Judge Hubert L. Will of the United States District Court of the Northern District of Illinois for two years and was a litigation attorney in two private law firms for eight years.

judge's private interests.[1] But is it a violation if the judge simply shows the officer a judicial identification card instead of a driver's license without expressly asking for or demanding favorable treatment?[2] A judge's call advising an assistant prosecutor to be more emotional in front of the jury in a sexual assault trial is an obvious, prohibited ex parte communication.[3] But if the judge simply meets privately with some attorneys in chambers just before they are to appear in his court and no one overhears the conversation, is it reasonable to assume no ex parte communications took place and there was no violation?[4] A judge

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[1] When the officer was not deterred, the judge warned the officer to "watch out from here on in." In re Winkworth, Determination (N.Y. Comm'n on Jud. Conduct Sept. 23, 1992), *at* http://www.scjc.state.ny.us/Determinations/w/winkworth.htm (admonition for this misconduct and driving while impaired).

[2] In re Werner, Determination (N.Y. State Comm'n on Jud. Conduct Oct. 1, 2002) *at* http://www.scjc.state.ny.us/determinations/w/werner.htm (admonition pursuant to agreement for handing over license and court identification card when stopped by officer for speeding); In re Heiple, Order (Ill. Courts Comm'n Apr. 30, 1997) (censure for four traffic stops in which the justice failed to cooperate with and disobeyed law enforcement officials and volunteered the information that he was a member of the judiciary).

[3] In re Starcher, 457 S.E.2d 147, 148-49 (W. Va. 1995) (reprimand). The judge also advised the prosecutor to have supporters present in the courtroom during closing argument and to use the term "serial rapist" frequently. The telephone call had been overheard by a law firm associate who was sitting in a room adjoining Judge Searcher's chambers when she became aware of a telephone conversation between the judge and the assistant prosecuting attorney about a criminal trial in which the defendant was accused of sexually assaulting several female students at West Virginia University. The judge admitted that the conversation occurred. *Id.*

[4] *Kennick v. Comm'n on Judicial Performance*, 787 P.2d 591 (Cal. 1990). For further discussion of this case, *see infra* accompanying text at notes 146-47.

who solicits bribes before improperly disposing of matters unquestionably commits a violation of the code of judicial conduct as well as a crime.[5] But is there an ethical breach if a judge initiates business transactions with a litigant and gets favorable terms after rendering a large monetary judgment?[6]

To hold judges to the highest standards of ethical conduct, a code of judicial conduct must cover not just the clear and obvious improprieties but indirect, disguised, or careless conduct that looks like an impropriety to an observer who is informed and thoughtful but not prescient or gullible. Thus, much of the American Bar Association Model Code of Judicial Conduct[7] is based on reasonable assumptions about a judge's impartiality based on the judge's conduct. For example, a judge may be capable of rendering unbiased decisions even if he belongs to a discriminatory organization, but rather than asking the public to take that on faith, judges are prohibited from belonging

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[5] *See, e.g., In re Jenkins*, 465 N.W.2d 317 (Mich. 1991).

[6] *See Adams v. Comm'n on Jud. Performance*, 897 P.2d 544 (Cal. 1995) (removal for this and other misconduct). For a further discussion of this case, *see infra* text accompanying notes 80-90.

[7] References to the code of judicial conduct and to canons or sections of the code are to the *1990 American Bar Association Model Code of Judicial Conduct*. The 1990 model code retained most of the basic principles of the 1972 ABA model code but made several substantive changes and contains many differences in its details. Although the model code is not binding on judges unless it has been adopted in their jurisdiction, forty-nine states, the United States Judicial Conference, and the District of Columbia have adopted codes of judicial conduct based on either the 1972 or 1990 model codes. (Montana has rules of conduct for judges, but they are not based on either model code.)

to organizations that practice invidious discrimination.[8] Similarly, a judge may be able to render a fair decision even if her nephew is the attorney in the case, but rather than give the parties a basis for questioning the decision, the judge is required to disqualify.[9]

In addition, the code of judicial conduct provides in Canon 2 that "a judge shall avoid impropriety and the appearance of impropriety in all of the judge's activities," defining an "appearance of impropriety" in commentary as conduct that "would create in reasonable minds a perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality and competence is impaired."[10] The reasonable person standard is also present in code sections requiring a judge to disqualify himself or herself from a case when the judge's "impartiality might reasonably be questioned,"[11] and requiring a judge to conduct all extra-judicial activities so that they do not "cast reasonable doubt on the judge's capacity to act impartially as a judge."[12]

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[8] Canon 2C ("A judge shall not hold membership in any organization that practices invidious discrimination on the basis of race, sex, religion or national origin").

[9] Canon 3E(1)(d). The parties may waive that disqualification. Canon 3F.

[10] All states but Oregon and Montana refer to the appearance of impropriety in their codes of conduct.

[11] Canon 3E(1). This article will focus on cases other than those involving disqualification. For a discussion of the application of the appearance of impartiality standard for disqualification, *see* Leslie W. Abramson, *Appearance of Impropriety: Deciding When a Judge's Impartiality "Might Reasonably be Questioned,"* 14 GEO. J. LEGAL ETHICS 55 (Fall 2000).

[12] Canon 4A(1).

Some critics have argued that the appearance of impropriety standard is at best merely aspirational and at worse unconstitutionally vague and in either case out of place in a code used as the basis for disciplinary sanctions of judges. Several groups, although none comprised solely or even largely of judges, have asked the ABA to eliminate the standard from the model code in its current revision process.[13]

Canon 2, however, is a vital component of the code of judicial conduct. As the case-law analysis in this article will demonstrate, judicial discipline authorities are not using the standard as an arbitrary smell test but are applying it in a cautious, reasoned, and appropriate manner with no evidence of overly subjective interpretation. This article will also examine the criticisms of the

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[13] *See* Letter from Ronald C. Minkoff, Secretary, Association of Professional Responsibility Lawyers, to ABA Joint Commission to Evaluate the Model Code of Judicial Conduct (June 30, 2004), *at* http://www.abanet.org/judicialethics/resources/comm_rules_minkoff_063004.pdf [hereinafter APRL comments]; Memorandum from Charles E. McCallum, Chair, ABA Standing Committee on Ethics and Professional Responsibility, to Mark I. Harrison, Chair, ABA Commission on Evaluation of the Model Code of Judicial Conduct (Apr. 12, 2005), at http://www.abanet.org/judicialethics/resources/comm_rules_aba_ethics%20committee_4125_ddt.pdf. In September 2003, the ABA appointed a Joint Commission to Evaluate the Model Code of Judicial Conduct to review the ABA's Model Code and to recommend revisions. The Commission has held public hearings across the country in 2004-2005 and released several drafts. A preliminary report was released for comment in June 2005, and a final report will be considered by the ABA House of Delegates in 2006. See http://www.abanet.org/judicialethics/home.html. Although in partial drafts, the ABA Joint Commission watered down the "appearance of impropriety" standard, in the preliminary draft, it left the standard essentially unchanged from the 1990 model code, noting that the "[m]ajority of commentators on the subject, citing to judicial discipline decided over a three-decade period, urged that the concept be retained."

standard. The article concludes that the standard is not too vague to follow and that, given their power and prestige, requiring judges to consider the implications of their conduct for public confidence in the judiciary is not too much to ask and, indeed, is a responsibility most judges readily assume.

II. Appearance of Impropriety as an Aspirational Standard

The code of judicial conduct is not simply a penal provision, threatening judges with the possibility of disciplinary sanction, but an important reminder to them of the ethical foundations of their role in a free society. The appearance of impropriety standard is "peculiar to the judiciary"[14] because judges have a peculiar position in the American system; they are required to make decisions that sometimes many members of the public will challenge and at all times at least one party will dispute. Although judges must ignore public clamor about the substance of their decisions, they cannot afford a callousness toward public opinion about their integrity and impartiality based on the choices they make about their conduct.

Moreover, incorporating those values in the code of judicial conduct – which is adopted by the state supreme courts – announces to citizens that judges are willing to hold themselves to very demanding ethical standards in light of the power they are given over others' lives.

> Avoiding the appearance of impropriety is as important to developing public confidence in the

[14] In re Spector, 392 N.E.2d 552, 553 (N.Y. 1979).

> judiciary as avoiding impropriety itself. The responsibility of the judge extends not only to the business of the courts in its technical sense, such as the disposition of cases, but also to the business of the judge in an institutional sense, such as the avoidance of any stigma, disrepute, or other element of loss of public esteem and confidence in respect to the court system from the actions of a judge.[15]

The appearance of impropriety standard does not unfairly assume that judges lack integrity, but the alternative of asking the public simply to trust that judges are upright despite appearances[16] ignores the public's suspicions about public officials in general as well as judges,

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[15] In re Dean, 717 A.2d 176, 185 (Conn. 1998).

[16] Judge Alex Kozinski, of the United States Court of Appeals for the Ninth Circuit, for example, has argued:

> I know there's a growing tendency to distrust judges – to craft more elaborate ethical rules and restrictions, to expand the scope of what is encompassed within the appearance of impropriety standard, to adopt better methods of intruding into judges' private lives – all in a misguided effort to promote ethical judicial behavior. But the hard truth is that few of those things really matter. Judicial ethics, where it counts, is often hidden from view, and no rule can possibly ensure ethical judicial conduct. Ultimately, there is no choice but to trust the judges. To my mind, we'd all be better off in a world with fewer rules and a more clear-cut understanding that impartiality and diligence are obligations that permeate every aspect of judicial life – obligations that each judge has the unflagging responsibility to police for himself.

Alex Kozinski, *The Appearance of Impropriety,* LEGAL AFFAIRS (Jan. – Feb. 2005), *available at* http:www.legalaffairs.org/issues/JanuaryFebruary2005/argument_Kozinski_janfeb05.msp. *But see* M. Margaret McKeown, *Canon Fodder,* LEGAL AFFAIRS (May – June 2005), *available at* http://www.legalaffairs.org/issues/May-June2005/letters_mayjun05.msp.

suspicions that unfortunately have been confirmed and aggravated by scandal after scandal, some of which have involved judges. A reasonable level of cynicism by members of the public is justified; it would be naïve and foolish for citizens to blindly trust any public official, and it would imprudent for judges to assume, assert, or act as if they should be exempt from that skepticism.

All public servants are as a practical matter held to an appearance of impropriety standard by the press and public if not by a code of conduct. Reflecting that unofficial gauge, Canon 2 reminds judges to think carefully about what they say and do and to consider the perspective of a reasonable person who does not know them well. That is not bad advice for everyone, and it is a critical factor in maintaining public confidence in an individual judge and the judiciary in general.

III. Appearance of Impropriety as a Disciplinary Standard

The appearance of impropriety standard is necessary and justified even if the code is viewed only from a disciplinary perspective. Although in most judicial discipline cases, a judge is charged with violating a specific canon such as the prohibition on ex parte communications, there are cases based on findings of an appearance of a violation. Most appearance cases fall into several categories.

A. Use of Influence: Winks and Nods

Invoking the judicial office to cajole or bully a favor is a classic example of judicial misconduct, giving rise to

numerous judicial discipline cases.[17] If the pressure is express and the favor is granted, the improper use of the

[17] *See, e.g.*, Inquiry Concerning Platt, Decision and Order (Cal. Comm'n on Jud. Performance Aug. 5, 2002) *available at* http://cps.ca.gov/cn%20removals/Platt%208-5-02.rtf (asking another judge to release on her own recognizance the daughter of a family from the judge's church); Inquiry Concerning Holloway, 832 So. 2d 716 (Fla. 2002) (requesting scheduling favor from another judge for family member); In re Parros, 847 So. 2d 1178 (La. 2003) (intervening on behalf of niece with prosecuting attorney, presiding judge in her felony theft case, and victim's father); Comm'n on Jud. Performance v. Brown, 761 So. 182 (Miss. 2000) (contacting officer who arrested son for DUI and asking judge assigned to son's case for help getting the case dismissed); In re Bowers, Determination (N.Y. Comm'n on Jud. Conduct Nov. 12, 2004) *available at* http://scjc.state.ny.us (stating in letter to another judge on judicial stationery about a ticket received by an acquaintance "if you can help out I would appreciate this, and if not, I will understand"); In re Canary, Determination (N. Y. State Comm'n on Jud. Conduct Dec. 26, 2002) *available at* http://scjc.state.ny.us/determinations (angrily disputing traffic tickets issued to the judge's son with police officer and his superior; intervening in son's second arrest); In re Leonard, Determination (N.Y. State Comm'n on Jud. Conduct Dec. 26, 2002) *available at* http://scjc.state.ny.us (acting as advocate with police officer for grandson and asking why she had not been given advance notice of a search); In re Magill, Determination (N.Y. State Comm'n on Jud. Conduct Oct. 6, 2004) *available at* http://scjc.state.ny.us (interjecting judicial prestige into case in which wife was complaining witness); In re Martin, Determination (N.Y. State Comm'n on Jud. Conduct Dec. 26, 2001) *available at* http://scjc.state.ny.us (letters seeking special consideration on behalf of defendants awaiting sentencing in other courts on judicial stationery); In re Williams, Determination (N.Y. State Comm'n on Jud. Conduct May 17, 2002) (asking another judge to vacate an order of protection entered against friend) *at* http://www.scjc.state.ny.us; In re Berkhimer, 828 P.2d 19 (Pa. Ct. Jud. Dis. 2003) (calling police officer about driving while intoxicated charge against someone else, leading officer to withdraw charges); In re Kelly, 757 A.2d 456 (Pa. Ct. Jud. Dis. June 29, 2000 and August 23, 2000) (contacting another judge about a friend's traffic violation, stating "I would appreciate your help not guilty he is a great guy he can help you, come through me I don't ask to much").

prestige of office and the violation of the code of judicial conduct are obvious.[18]

More subtle, less bald-faced but still manifest attempts to gain an improper advantage from the judicial office are captured by the appearance of impropriety standard and represent the largest number of cases finding an appearance of impropriety. This application of the appearance standard reflects the reasonable person's understanding that much of human communication is unspoken, between-the-lines, with winks and nods, and depends on what goes without saying. Gratuitous references to the judicial office, for example, have been held to impliedly but obviously and inappropriately invoke the prestige of the office even absent an express request for favorable treatment.

For example, in *In re Collester,*[19] the New Jersey Supreme Court considered a judge who, stopped on suspicion of driving while intoxicated, told the trooper that he was a superior court judge when asked for his driving credentials and repeated the statement during the field sobriety tests. The court found that the judge's " 'references to his judicial status gave the impression that he was entitled to some special preference.' He thus clearly used the prestige and weight of his judicial office to try to gain some personal advantage."[20]

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[18] Canon 2B provides in part that "a judge shall not lend the prestige of judicial office to advance the private interests of the judge or others."

[19] 599 A.2d 1275 (N.J. 1992).

[20] *Id.* at 1278. The judge was suspended for two months without pay for his second DWI violation as well as informing the arresting officer that he was a judge and falsely stating that he was responding to

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In a different context but with a similar conclusion, the New York State Commission on Judicial Conduct found that, regardless of intent, a judge's repeated, pointed references to his judicial status during a dispute with a snowmobile dealer created the appearance that he was attempting to use his judicial prestige to further his personal interests.[21] The judge had identified himself as a judge while talking to a salesman, a secretary, the manager, and the proprietor even though his judicial status was irrelevant to whether he was entitled to be reimbursed for repairs to his snowmobile. When refused reimbursement, the judge stated he would take the matter to small claims court and that he knew how "the system"

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an emergency at the courthouse. *See also* In re Travis, Order (Ill. Ct. Comm'n Feb. 21, 2003) (one-month suspension for, in addition to other misconduct, showing badge that said "judge" to police officer and telling officer he was a judge); In re Werner, Determination (N.Y. State Comm'n on Jud. Conduct Oct. 1, 2002) *available at* http://scjc.state.ny.us (admonishment pursuant to agreement for showing official identification card when stopped by police for traffic offenses even absent explicit request for special consideration); In re Cipolla, Determination (N.Y. State Comm'n on Jud. Conduct Oct. 1, 2002) *available at* http://scjc.state.ny.us (censure for, in addition to other misconduct, displaying an identification card and badge that identified him as an acting judge during a dispute with a club doorman when the doorman had not asked for identification); In re Esposito, Determination (N.Y. State Comm'n Sept. 19, 2003) *available at* http://scjc.state.ny.us (censure pursuant to agreement for, in addition to other misconduct, referring to his judicial office while complaining to tax assessor about the assessment of property owned by the wife of a former colleague with whom he had a contentious relationship); In re Krauciunas, Determination (N.Y. State Comm'n on Jud. Conduct Nov. 18, 2002) *available at* http://scjc.state.ny.us (admonition for being rude and gratuitously referring to judicial office while dealing with other judge and clerk about daughter's small claims case).

[21] In re Dumar, Determination *available at* http://scjc.state.ny.us (N.Y. State Comm'n on Jud. Conduct May 18, 2004).

worked. When he did file suit, he left his business card with the clerk of the court and introduced himself to a judge of the court where the case was pending. Finally, he identified himself as a judge when he made a complaint about the dealership to a state agency. The Commission found that the judge's statements "could well be perceived as intimidating, especially in the context of demanding reimbursement for the repairs, threatening a lawsuit and saying that he knew how 'the system' worked."[22]

Moreover, in the context of legal proceedings, an attempt to influence is inherent in even a simple inquiry from a judge to an individual such as a police officer, prosecutor, or other judge who is aware of the inquirer's judicial status. Any communication from a judge in that situation may be perceived as "backed by the power and prestige of judicial office"[23] and constitute an implied request for a favor.

In *In re Snow*,[24] after his brother was cited for speeding, Judge Snow called the police officer who had issued the summons and remarked that it was funny that the officer had not recognized his brother because the officer had helped his brother paint the judge's house the previous summer.[25] The officer told the judge that if he had known the driver was the judge's brother, he would probably have only issued a warning.[26] Although Judge Snow

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[22] *Id.* The Commission censured the judge pursuant to an agreement. *Id.*

[23] In re Lonschein, 408 N.E.2d 901, 902 (N.Y. 1980).

[24] 674 A.2d 573 (N.H. 1996).

[25] *Id.* at 574-75.

[26] *Id.*

told the officer that he was not calling to fix the ticket, the ticket was thrown away when the judge's brother, at the judge's direction, brought the summons to the police station.[27]

Rejecting the judge's argument that he did not engage in serious misconduct because he did not intend to fix his brother's ticket, the New Hampshire Supreme Court concluded that "[t]here is no intent requirement in these canons," and "in fact, it is practically impossible to impose a mens rea element on the 'appearance of impropriety' standard in Canon 2."[28] The court stated that "[e]ven assuming that Judge Snow was not subjectively aware of the impropriety of his telephone call at the time that he made it, Judge Snow should have known that his actions would create the appearance of impropriety."[29]

As *Snow* demonstrates, the appearance of influence is created even if the judge tells the contact that he or she is not seeking favorable treatment. In a similar case, Judge Pennington met with the county district attorney to review a charge against his sons; the charge was dismissed for lack of prosecution, which suggested that the judge's advocacy was successful.[30] The judge had told the district attorney that he was there as the defendant's father and not to use his position to ask for any favors, but in discipline proceedings, the judge "acknowledged that the mere

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[27] *Id.*

[28] *Id.* at 577 (citation omitted).

[29] *Id.* at 578. The court suspended the judge for six months without pay.

[30] In re Pennington, Determination *available at* http://scjc.state.ny.us (N.Y. State Comm'n on Jud. Conduct Nov. 3, 2003).

fact of his judicial status increased the likelihood that he could not only obtain such a meeting, but get the District Attorney's 'heightened attention' to his concerns about his son's treatment."[31] The New York Commission concluded the contact was prohibited by "well-established ethical standards" even in the absence of a specific request for special consideration.[32]

Proof that the judge's conduct actually resulted in inappropriate influence is not necessary to prove an appearance of influence. In *In re Chaisson*,[33] Judge Chaisson had promised a litigant that "he would check on the status of a settlement" being negotiated for a $15 million judgment against the state for injuries that had left the litigant a quadriplegic.[34] While in the state capitol regarding a judicial salary bill, the judge asked the state officials handling the settlement negotiations about the figures on the table.[35] The Louisiana Supreme Court noted that there was no evidence that Judge Chaisson actually influenced the settlement. Therefore, the judge had not used the prestige of his office to advance the litigant's interests.[36]

The court, however, did not end the inquiry there but proceeded to consider whether the judge's inquiry would raise a reasonable person's suspicions that he had lent the

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[31] *Id.*

[32] *Id.* The judge was censured pursuant to an agreement for this and other misconduct.

[33] 549 So. 2d 259 (La. 1989).

[34] *Id.* at 261.

[35] *Id.* at 262.

[36] *Id.* at 263. Any settlement would have required a legislative act to appropriate funds for payment.

prestige of his office to advance the litigant's interests.[37] The court noted "it was highly unlikely that an ordinary citizen claiming to be a friend of [the litigant] would have been made privy to the details of the settlement negotiations."[38]

> [S]ince the matter settled on terms favorable to [the litigant] shortly after Judge Chaisson's involvement, a reasonable person might well suspect that this was the result of some improper influence. This suspicion is made even more reasonable by the fact that the true nature of Judge Chaisson's involvement was not public and thus even more likely to be perceived as wrongdoing. These factors alone are sufficient to establish the appearance of impropriety that weakens "public confidence in the integrity of the judiciary. . . ."[39]

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[37] *Id.*

[38] *Id.*

[39] *Chaisson*, 549 So. 2d at 263. *See also* Inquiry Concerning Simpson, Decision and Order (Cal. Comm'n on Jud. Performance Dec. 9, 2002) *available at* http://cjp.ca.gov/CNCenureRTF/Simpson%20Decision%2012-9-02.rtf (censure of retired judge pursuant to agreement for asking a court commissioner question about tickets issued to three friends or relatives of friends; calling a commissioner about a ticket received by a friend; asking a police officer); Inquiry Concerning Block, Decision and Order (Cal. Comm'n on Jud. Performance Dec. 9, 2002) *available at* http://cjp.ca.gov/CNCensureRTF/Block%20Decision%2012-09-02.rtf (censure of retired judge pursuant to consent for expressing concern to managing judge about way ticket for friend's daughter had been handled); Inquiry Concerning Platt, Decision and Order (Cal. Comm'n on Jud. Performance Aug. 5, 2002) *available at* http://cjp.ca.gov/CN%20Removals/Platt%208-5-02.rtf (removal for, in addition to other misconduct, calling a court commissioner to learn how his godfather might go about getting his ticket on the calendar); In the Inquiry Relating to Alvord, 847 P.2d 1310 (Kan. 1993) (censure for, in addition to other misconduct, making two unsolicited phone calls on behalf of a clerk to a prosecutor asking if anything could be done about

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The use of judicial letterhead also inherently and inevitably creates the appearance of a misuse of the prestige of office. When a justice of the Alaska Supreme Court sent three letters on chambers stationery to the counsel for a state agency regarding litigation in which the justice was involved as a private citizen, the court found that a reasonably objective person would believe that the justice was attempting "to influence opposing counsel and other viewers of the letters or that it had this effect."[40]

The court noted that the judge easily could have avoided risking a negative effect on the confidence of the public by using different stationery.[41] The court also

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a ticket although there was no actual use of influence attempted by the judge and none was perceived by the prosecutor); In re Young, Determination (N.Y. State Comm'n on Jud. Conduct Dec. 29, 2000) *available at* http://www.scjc.state.ny.us (censure pursuant to agreement for telling a hearing examiner that a friend's ex-husband was a "hard ass" and was being "unreasonable" by not contributing to the college expenses of one of their children); In re Whelan, Determination (N.Y. State Comm'n on Jud. Conduct Dec. 27, 2001) *available at* http://www.scjc.state.ny.us (admonition pursuant to agreement for urging attorney to convince clients to pay bill related to real estate transaction handled by judge's spouse); In re Looper, 548 S.E.2d 219 (S.C. 2001) (reprimand of former judge pursuant to consent for communicating with another judge to ensure that judge was aware of his personal interest in pending case). *But see* Inquiry Concerning Holloway, 832 So. 2d 716 (Fla. 2002) (request to a police detective conducting a criminal investigation of allegations involving a family friend keeping her apprised of developments in the case was "not, in itself, sufficient to conclude that the judge is abusing her office").

[40] Inquiry Concerning a Judge, 822 P.2d 1333, 1340 (Alaska 1991).

[41] *Id.* at 1341. Rejecting the justice's argument that it was not official stationery and the court system had no written policy restricting the use of chambers stationery, the court found that "an objectively reasonable person would not know the difference between the two types of stationery or whether any policy existed" and individual judges have

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concluded that whether the recipients of the letters were influenced by the stationery was irrelevant to the opinions of the thinking public who might see the letters.[42]

The judge in *In re Mosley*[43] sent two letters on court letterhead to his son's school asking that the school prohibit his ex-girlfriend (his son's mother) from visiting the boy at school. The judge argued that he had not misused the prestige of office because the school principals already knew he was a judge and did not provide special treatment to him.[44] Rejecting that argument, the Nevada Supreme Court concluded that an objective reasonable person could conclude that the judge used his judicial letterhead in an attempt to gain a personal advantage.[45]

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an obligation to follow ethical constraints notwithstanding any court system policy or lack of policy. *Id.* at 1340-41.

[42] *Id.* However, rejecting the Commission's finding, the court concluded that a reasonably objective person would not believe that an impropriety was afoot from the justice's identification of himself as a "justice" when calling the governor because in the same conversation he stated he was calling on a personal matter. *Id.* at 1341. The justice was privately reprimanded for meeting with the governor and using judicial stationery to communicate with opposing counsel in a private lawsuit. *See id.*

[43] 102 P.3d 555 (Nev. 2004).

[44] *Id.* at 559.

[45] *Id.* The judge had been awarded custody of the boy after a bitter battle with his ex-girlfriend. The judge was censured and fined $5,000 for this and other misconduct. *See also* In re Nesbitt, Determination (N.Y. Comm'n on Jud. Conduct June 21, 2002) *available at* http://www.scjc.state.ny.us (admonition pursuant to agreement for letter on judicial stationery to school official challenging administrative determination concerning judge's son). *But see* In re Rosenblum, Order (Ill. Ct. Comm'n July 29, 1993) (dismissing a complaint alleging that a judge used the prestige of office to advance his personal interests in connection with an apartment building the judge co-owned by identifying himself as a judge in a telephone call to a social worker with the

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The Washington State Commission on Judicial Conduct found that a judge's inquiry to an attorney about a campaign sign endorsing his opponent in front of the attorney's office could reasonably be perceived as an attempt to exert, at least implicitly, influence over the attorney.[46] The judge inquired why a campaign sign endorsing the judge's opponent was displayed in the yard in front of the attorney's law office and whether the display meant the attorney was supporting the judge's opponent. The conversation was cordial, but it occurred in the judge's courtroom, while the judge was on the bench, wearing his judicial robe and immediately following a hearing in which the attorney participated.[47]

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charitable organization that had guaranteed the lease payments, sending letters to the organization using official court stationery, attending several court hearings in a criminal misdemeanor complaint against the tenant filed by the judge's co-owner, and assuming a substantial role in the hearings).

[46] In re Krouse, Stipulation, Agreement, and Order of Reprimand (Wash. State Comm'n on Jud. Conduct June 10, 2005) *at* http://www.cjc.state.wa.us/casematerial/2005/4560%20stipulation.pdf. *See also* In re Sobel, Imposition of Discipline (Nev. Comm'n on Jud. Discipline July 19, 2005) *at* http://www.judicial.state.nv.us/decisiononsobel.htm (a judge told an attorney he was "fucked" because he had not yet contributed to the judge's re-election campaign and asked a second attorney why he had contributed $3,500 to the judge's opponent's campaign but only $500 to the judge's campaign).

[47] The Washington Commission also concluded that the judge appeared to personally solicit campaign contributions in three e-mails when, during his 2004 judicial campaign, his campaign committee co-chair sent three e-mails from the campaign e-mail accounts (prefixed with "judgekrouse") that requested monetary donations to assist in the judge's campaign. The e-mails were written in the first person and two of the e-mails concluded with "Merle" (the judge's first name) in the typed signature line. The Commission noted the judge had the duty to assure communications from his campaign committee complied with the code of judicial conduct.

B. Appointments: No *Quid Pro Quo*

The code of judicial conduct prohibits favoritism in appointments, requiring a judge to "exercise the power of appointment impartially and on the basis of merit."[48] An appearance of favoritism "is no less to be condemned than is the impropriety itself."[49] While few cases find proof of actual favoritism, several hold that a combination of factors produced the appearance that a judge exercised the power of appointment based on something other than the appointee's qualifications.

For example, in a case from Alaska,[50] Judge Johnstone appointed an individual he knew was the friend of the chief justice because the chief justice had suggested him. Because of the candidate's connection to the chief justice, the Alaska Supreme Court noted, the judge should have known he had to take special precautions to avoid the appearance of favoritism.[51] Instead, Judge Johnstone went outside the merit selection process he had initiated to appoint the chief justice's friend.[52] The individual had not applied during the application period, and the appointment was based on criteria that were not part of the stated

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[48] Canon 3C(4).

[49] In re Spector, 392 N.E.2d 552, 554 (N.Y. 1979).

[50] In re Johnstone, 2 P.3d 1226 (Alaska 2000). Because the case involved the chief justice, review was by a special supreme court comprised of members of the court of appeals.

[51] *Id.* at 1236.

[52] *Id.* Noting that it was undisputed that the judge initially had no duty to follow a merit selection process, the court stated that once he initiated a merit process, it should have been obvious to the judge "that he could not select an individual from outside the process without upsetting the reasonable expectations" of the individuals who had followed established procedures. *Id.*

qualifications and "on terms . . . that were significantly different from those advertised to the general public."[53]

The court emphasized that the question was not whether the judge's individual actions viewed in isolation would give rise to an appearance of impropriety" but "the cumulative effect" of the actions.[54] The court concluded that the events "would leave an objectively reasonable person with the indelible impression" that the coroner's hiring involved favoritism.[55] The court noted that the judge's explanation that he thought the man he hired was the most qualified applicant did not eliminate the appearance arising from the objective record.[56]

Similarly, the Louisiana Supreme Court found an appearance of impropriety when a judge hired his girlfriend to review and summarize medical records in nineteen cases, paying her with taxpayer funds and using taxpayer money to pay for her training to become a certified legal nurse consultant.[57] No actual favoritism was found as the judge's girlfriend was fully qualified to do the work for which she was hired and did indeed perform the work and her involvement did not affect the judge's adjudicatory function.[58]

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[53] *Id.*

[54] *Id.* at 1236-37.

[55] *Id.*

[56] *Johnstone*, 2 P.3d at 1237. The judge was publicly reprimanded.

[57] *In re Granier*, 906 So. 2d 417 (La. 2005).

[58] The judge was censured pursuant to the Judiciary Commission's recommendation, to which the judge had consented. The judge was also required to reimburse his court for the amount paid for his girlfriend's tuition to attend a week-long legal nurse consultant course and to cover her travel expenses. The Commission had found that the judge "unwit-

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The timing of a judge's appointments of her accountant as a fiduciary was found to have created an appearance of *quid pro quo* in *In re Lebedeff*.[59] During four years when Judge Lebedeff was appointing her personal accountant as a fiduciary in three instances and approving more than $21,000 in compensation, the judge was not paying the accountant for preparing her taxes (a $1200 benefit) because the accountant was not billing her.[60] The Commission concluded that, even though it was not alleged that the judge had agreed to appoint the accountant in exchange for free tax preparation services, the judge "had a duty to avoid even the appearance of receiving any financial benefits from her appointee."[61]

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tingly enriched" his girlfriend when he used taxpayer money to enable her to become a certified legal nurse consultant, which gave her a credential she could use for additional services to the legal community.

[59] Determination (N.Y. State Comm'n on Jud. Conduct Nov. 5, 2003), *at* http://www.scjc.state.ny.us.

[60] *Id.* Alice Krause had been a friend of the judge since around 1978 and had prepared the judge's tax returns since approximately 1980. *Id.* Once in 1993, once in 1996, and once in 1997, the judge appointed Krause as a fiduciary or guardian of the personal needs of an allegedly incapacitated person. *Id.* The judge advised the parties that Krause was her personal accountant, and there were no objections. *Id.* In 1997 the judge twice approved compensation to Krause for her services, $16,500 in one case and $5,393 in a second. *Id.* Although Krause had not, as of January 2003, submitted a request for payment in the third case, she had indicated that she intended to do so. *Id.* From 1980 to 1996, as a general practice, Krause prepared and contemporaneously billed the judge for her annual tax preparation services. *Id.* Krause prepared the judge's 1996, 1997, and 1998 federal and state income tax returns but did not bill the judge for those services until July 2001 after she was questioned about her relationship with the judge by the court system's Special Inspector General for Fiduciary Appointments. *Id.*

[61] *Id.* The judge was censured pursuant to an agreement. The *New York Daily News* criticized the finding of only an appearance of impropriety: "Here's how that will translate to judges, a breed ever sensitive

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In *In re Feinberg,* the New York Court of Appeals found an appearance of favoritism when a judge appointed a friend as counsel to the public administrator and then, over more than five years in 475 proceedings, awarded several million dollars in fees to that friend without applying statutory standards and without requiring substantiation.[62] After his election, the judge, without any search or interview process, appointed his friend and law school classmate, Louis Rosenthal, to replace the firm that had for several decades served as counsel to the public administrator.[63] Rosenthal had helped to raise funds for the judge's election campaign but had limited experience in surrogate's court.

The court found that the judge had a pro forma practice of awarding Rosenthal 8% of an estate's value, without attention to the actual work done. The judge did not individually review the files, he never rejected or reduced a fee request, and he never questioned a request

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to precedent: The commission will not bounce a judge unless said judge enters into a bargain with the terms written in neon. You pay me and I'll pay you back. Short of such explicit, and criminal, corruption, the commission will frown on mutual wallet-fattening amid winks among pals." Editorial, *This Watchdog Doesn't Bark or Bite,* NEW YORK DAILY NEWS, Nov. 26, 2003.

[62] 833 N.E.2d 1204 (N.Y. 2005).

[63] The public administrator administers the estates of decedents who die without a will or where there is no qualified individual who has petitioned to administer the estate. Counsel's duties include petitioning for letters of administration, marshaling the estate assets, searching for heirs, conducting kinship hearings, disposing of real property, filing tax returns, and generally representing the interests of the public administrator in all aspects of administration of estates. Counsel is paid from the assets of the estate and approved by the surrogate. In re Feinberg, Determination (N.Y. State Comm'n on Jud. Conduct Feb. 10, 2005), *available at* http://www.scjc.state.ny.us./Determinations/F/feinberg.htm

or sought additional information. The judge never required Rosenthal to submit an affidavit of legal services before approving a fee request and never considered the statutory factors for fee awards specified in the Surrogate's Court Procedure Act. Between January 1997 and December 2002, the judge awarded Rosenthal $8,613,009.35 in legal fees.

The court also found that the judge's failure to follow the statute was made more egregious by his appointment, without considering other candidates, of a close personal friend and political supporter. The court stated, "while appointment of a friend does not itself convey an appearance of impropriety, when, as here, that appointment is coupled with the unsubstantiated award of several million dollars in fees from estates that, by definition, lack adversarial parties to challenge the practice, the taint of favoritism is strong."[64]

Also in New York, Judge Ray had appointed two attorneys as guardians in a disproportionate number of cases, bypassing the rotation system through which law guardians were usually assigned by the court clerk.[65] The

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[64] In re Feinberg, 833 N.E.2d at 1209. The judge was removed from office. The court found that the judge's "repeated explanation that he 'just read through sections' or 'skimmed' the SCPA, and that his failure – over a period of more than five years – to know of and adhere to the single paragraph requirement of affidavits of legal services and individualized consideration of fee requests was an 'oversight,' demonstrate a shocking disregard for the very law that imbued him with judicial authority." *Id.* at 1208.

[65] In re Ray, Determination (N.Y. State Comm'n on Jud. Conduct Apr. 26, 1999), *at* http://www.scjc.state.ny.us. There were approximately ninety attorneys on the panel of law guardians. *Id.* In 1993 the judge gave William Maney 18% of the law guardian appointments and gave Edward Boncek 6.4% of the cases; in 1994 the judge gave Maney 17% of

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judge also routinely certified payments to the attorneys without examining the vouchers they had submitted; had the judge reviewed the vouchers, it would have been apparent to him that the attorneys were over-billing.[66] The appointments were particularly puzzling because one of the attorneys had run against the judge in 1985. Then, in January 1995, after being awarded over $88,000 in fees by the judge over two years, the attorney announced that he would not oppose the judge for a new ten-year term.[67]

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the appointments and Boncek 5.4%. *Id.* The chief clerk and the deputy chief clerk spoke to the judge about departing from the rotation of assignments and advised the judge that they were receiving complaints from other attorneys that the judge was appointing certain attorneys, particularly Maney and Boncek, to a disproportionately high number of cases. *Id.*

In 1993 the judge awarded Maney $58,177 and Boncek $20,253 in fees. *Id.* The average fee for all law guardians assigned by the judge that year was $4,434. *Id.* In 1994, the judge awarded Maney $30,660 and Boncek $13,800; the average fee that year was $3,354. *Id.* Beginning in the early 1990s, the judge received quarterly statements from the law guardian program that indicated that Maney and Boncek were receiving a disproportionately high number of assignments and a disproportionately high income from their work as law guardians in the family court. *Id.*

[66] *Id.* An audit by the Office of Court Administration revealed that between April 1, 1992, and December 31, 1995, Maney and Boncek had submitted vouchers that grossly overstated the number of hours that they had spent on cases and billed for proceedings that they did not attend or for cases in which they were not assigned. *Id.* Some of the vouchers double-billed for work. *Id.* On a number of occasions, they submitted vouchers in which they billed for more in-court hours than the court was in session. *Id.*

[67] *Id.* The other was the judge's former opponent's law partner. *Id.* The two attorneys also offered to help the judge obtain the cross endorsement of the Democratic party. *Id.* The judge accepted their offer. *Id.*

The New York Commission found that "the combination of these factors created the appearance that the lawyers were getting favored treatment from the judge. . . . [S]uch laxity, in view of the political relationship of respondent and [the attorney], creates the appearance that his serious lack of oversight may have been politically motivated."[68] The judge was censured pursuant to an agreement.[69]

Because actual favoritism seems clearly proven by the agreed facts (the disproportionate number of appointments, dodging the rotation system, rubber-stamping requests for reimbursement, the political relationship), *In re Ray* demonstrates an additional use of the appearance of impropriety standard – as a lesser included offense that facilitates "plea bargains" in disciplinary proceedings. In an agreed disposition, the appearance of impropriety standard gives the judge a face-saving way to admit with the benefit of hindsight to apparently committing misconduct without having to admit to actually meaning to do anything wrong.

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[68] *Id.*

[69] *Id. See also* In re Goodman, 649 N.E.2d 115 (Ind. 1995) (a perception that the court's business was based upon the exchange of favors arose when the judge entered into a contract with a corporation to provide services for a court program where the owner of the corporation was a close personal friend of the court administrator, hired the court administrator's son-in-law, and the owner hosted an engagement party when the judge became engaged to the corporation's in-house accountant).

C. Relationships: No Harm, No Foul?

Absence of proof that a judge actually favored an attorney or party does not preclude a finding of misconduct if a reasonable person would assume that the judge would favor the attorney or party, however unconsciously, because of a close, personal relationship. Calling "immaterial" the question whether there was a "detrimental impact" on criminal defendants, for example, the Iowa Supreme Court stated that "once the public learned" of a judge's sexual relationship with the state's attorney who appeared before him daily, "the appearance of bias was very real."[70] Thus, the court rejected Judge Gerald's argument that his misconduct was mitigated because there was no evidence that he had favored the state.[71] Instead, the court found persuasive the analysis of the Commission on Judicial Qualifications:

> What is the public to think when they learn the assistant county attorney was having a sexual relationship with a judge before whom she appeared? . . . *More importantly, what is a criminal defendant to think when the judge sentences that defendant or overrules that defendant's motion to suppress, when the assistant county attorney with*

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[70] In re Gerard, 631 N.W.2d 271, 278 (Iowa 2001).

[71] *Id.* Similarly, the New York Commission concluded that a judge's impartiality was suspect when he presided over ten cases in which mentally disabled, institutionalized patients were represented by an attorney with whom he had a romantic relationship even though in each case his decision was contrary to the attorney's position. In re DiBlasi, Determination (N.Y. State Comm'n on Jud. Conduct Nov. 19, 2001) *at* http:/scjc.state.ny.us (censure for this and other misconduct).

whom he is having a sexual relationship was arguing the case on behalf of the State?[72]

The court also held that a judge has an affirmative duty to disclose or recuse when circumstances in his life might cause someone to reasonably question his partiality.[73] The court noted that it was not the judge's "right to make these decisions for the affected parties. We agree with the commission that this 'paternalistic attitude on behalf of the judge is contrary to Iowa law.' "[74]

When a judge presides over a case involving a close friend, an appearance of partiality arises without any evidence of actual special treatment or even the expectation of special treatment. For example, in *In re Gaddis,*[75]

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[72] *Gerard,* 631 N.W.2d at 278.

[73] *Id.* at 279.

[74] *Id.* at 280. Several of the intimate encounters took place in rooms in the courthouse. *Id.* at 277. The court acknowledged that, although both the judge and the attorney were married to other people, it "normally would be loath to interfere in such personal matters." *Id.* The court held, however, that a sexual affair is regarded as improper when it involves a subordinate in a professional, highly sensitive public context. *Id.* The court suspended the judge for sixty days without pay for this and being dilatory in filing rulings and in making reports on unfinished rulings as required by a supreme court rule. *See also* In re Chrzanowski, 636 N.W.2d 758, 764 (Mich. 2001) (appearance of partiality arose despite a judge's "apparently fair disposition" of non-adversarial cases (the prosecutor was not present) in which the attorney with whom she was having an intimate relationship appeared); In re Simeone, Determination (N.Y. State Comm'n on Jud. Conduct Oct. 6, 2004) *at* http:www.scjc.state.ny.us (a judge's romantic involvement with the director of a youth services facility raised a suspicion that his ruling was influenced by personal considerations each time he favored the position she advocated).

[75] Stipulation, Agreement and Order (Washington State Comm'n on Jud. Conduct Dec. 10, 2004), *at* http://www.cjc.state.wa.us/case%20material/2004/3855%20Stipulation.pdf.

the judge had accepted Seattle Mariners baseball tickets and a dinner from an attorney who regularly appeared before him in probate cases and depended on his exercise of discretion in approving petitions for fees and other requests.[76] In addition, the judge and his wife had a personal, social relationship with the executive director and manager of a guardianship agency whose interests were frequently before the judge.[77] The Washington State Commission on Judicial Conduct found as follows:

> While there is no evidence that either individual . . . expected or received preferential treatment from Respondent, by accepting gifts and favors, and privately socializing . . . with persons who appeared (and were likely to continue to appear) before him, the judge created at a minimum an appearance of impropriety: his conduct created a reasonable perception of partiality and legitimate concerns about whether these individuals were in a special position to influence the judge.[78]

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[76] *Id.* On two occasions, the judge accepted four Seattle Mariners baseball tickets with the cumulative face value of $232 without reimbursing the attorney. *Id.* The judge had considered the tickets to be a form of compensation for working on a manual for which the attorney was responsible. *Id.*

[77] *Id.* At a dinner scheduled for work-related purposes, the judge also allowed the attorney to purchase dinner for him and another person, the bill for which totaled $287.27. *Id.* The judge bought a meal for this attorney on at least one occasion. *Id.* According to the judge, he perceived these as professional contacts in the course of preparing continuing education materials or ordinary social interactions. *Id.*

[78] *Id. See also* Inquiry Concerning Harris, Decision and Order (Cal. Comm'n on Jud. Performance Mar. 23, 2005) at http://cjp.ca.gov.PubAdmRTF/Harris%20PA%203-23-05.rtf (although there was no evidence of actual bias, a judge's conduct in helping an attorney who regularly appeared before him "find dates could raise questions in the mind of an objective observer regarding the judge's impartiality in cases

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Moreover, an appearance that a judge is trying "to collect for past deeds"[79] can arise from actions taken by a judge after a decision is issued. In *Adams v. Commission on Judicial Performance,*[80] after awarding an automobile dealer $5 million in a complex civil case against a bank, while the case was pending on appeal, the judge entered into several business transactions with the dealer, for example, buying a used Mercedes for his wife and a used Jeep for his daughter.[81] During his case before Judge

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handled by Mr. Schonbrun"); In re D'Auria, 334 A.2d 332 (N.J. 1975) (although at no time did anyone expect or receive any preferential treatment, a judge created an obvious appearance of impropriety by frequently eating lunch in public restaurants as a guest of attorneys or representatives of insurance companies in pending matters in the judge's division); In re Lebedeff, Determination (N.Y. State Comm'n on Jud. Conduct Mar. 18, 2005) *at* http://www.scjc.state.ny.us (because of her personal and professional relationship with a plaintiff, judge's rulings in his favor raise a suspicion that she was influenced by personal considerations; censure for this and other misconduct); Office of Disciplinary Counsel v. Lisotto, 761 N.E.2d 1037 (Ohio 2002) (accepting eight tickets to attend Pittsburgh Steelers football games from an attorney who appeared in numerous cases before the judge was misconduct although there was no evidence of any favor, preference, or improper action); Office of Disciplinary Counsel v. Cox, 770 N.E.2d 1007 (Ohio 2002) (receiving loans from attorneys who regularly appeared before him was misconduct although there was no evidence that any of the attorneys received any benefit); In re Looper, 548 S.E.2d 219 (S.C. 2001) (appearance of impropriety created despite absence of evidence that judge received favorable treatment when, while traffic charges against a defendant were pending in his court, the judge went to a car dealership owned by the defendant's father, and at which the defendant was employed as a salesman, and negotiated with the defendant the trade-in of his automobile for a new automobile and purchased another new vehicle from the dealership).

[79] Adams v. Commn' on Jud. Performance, 897 P.2d 544, 554 (Cal. 1995).

[80] *Id.*

[81] *Id.* at 553-56.

Adams, the automobile dealer had been represented by Patrick Frega, and in several of the transactions, the judge relied on Frega who, without the judge's knowledge, arranged for the judge to receive favorable terms.[82]

The California Supreme Court concluded that the record did not contain clear and convincing evidence that the judge had initiated the transactions with "the expectation of receiving a financial favor"[83] from the dealer. However, the court found that, by actively soliciting the assistance of a litigant to whom he had rendered an exceedingly large monetary judgment and whose interests remained before him, the judge created an appearance of impropriety.[84]

Moreover, regardless whether he had actual knowledge of the favorable terms negotiated by Frega, the court stated, by placing himself in Frega's hands, the judge "deliberately ignored the strong possibility that Frega ultimately would arrange for the [judge] to pay less than fair market value for the Jeep. . . . The court concluded that the judge's "conduct readily could be construed as an attempt to collect for judicial services rendered in the . . . litigation, and otherwise to use his judicial office to advance his personal interests. To an objective observer, petitioner's integrity and impartiality would appear to have been placed in doubt."[86]

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[82] *Id.* at 554-55.

[83] *Id.* at 554.

[84] *Id.*

[85] *Adams*, 897 P.2d at 556.

[86] *Id.* at 556-57.

In addition, Judge Adams had accepted a sweater valued at $150 from the dealer the same year as the judgment and had attended a dinner hosted by Frega in celebration of the satisfaction of the judgment in the litigation over which the judge had presided.[87] The court found that, although the judge did not solicit the gift, "under the circumstances it was incumbent upon him to return it . . . to avoid any doubt regarding the judge's independence or any appearance of impropriety." Finally, the court concluded

> regardless of the judge's motives, or of whether he was biased or impartial in the judicial proceedings involving the . . . litigation, his attendance at the dinner given in celebration of the satisfaction of the judgment in the . . . litigation indisputably gave rise to the appearance of partiality in favor of a litigant and his attorney whose very substantial interests had come before him.[89]

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[87] *Id.* at 559-61.

[88] *Id.* at 560.

[89] *Id.* at 557. Similarly, the New York Court of Appeals found that a judge had created the "damaging impression that his judicial decisions were influenced by personal profit motives" when he directed that nearly a quarter of a million dollars in infants' funds be deposited in a credit union from which he received preferential treatment on interest, including interest-free loans. In re Cohen, 543 N.E.2d 711 (N.Y. 1989). The court removed the judge. *See also* In re Voetsch, Determination (N.Y. State Comm'n on Jud. Conduct Aug. 17, 2005), at http://www.scjc.state.ny.us (a part-time judge created the appearance that his employment as a real estate broker was a reward for favorable action when he accepted employment from an individual who had recently been a successful litigant in his court and from the family of a defendant to whom he had recently given a lenient sentence).

D. Associating with Criminals

The Louisiana Supreme Court concluded that a judge's extra-marital affair with a felon on parole from a prison sentence that the judge had imposed suggested "improper influence, whether or not such exists," creating an appearance of impropriety.[90] The relationship had been publicized in a lengthy article in the *Baton Rouge Advocate*. The court concluded

> [a]lthough it is not illegal to associate with known criminals, when a judge, who has sworn to uphold the law, enters into an intimate relationship with a convicted felon whom she sentenced in her court, the public's perception of such a relationship causes disrespect for the judiciary and falls below the standard the public has a right to expect.[91]

In New Jersey, Judge Blackman attended a picnic two days before his host, a friend of the judge for eighteen years, was going to begin a two-and-one-half year prison sentence for racketeering.[92] The picnic was widely publicized and attended by 150 to 200 people. Newspaper accounts interpreted the judge's attendance as support for

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[90] *In re Harris*, 713 So. 2d 1138, 1141 (La. 1998).

[91] *Id.* In deciding not to remove the judge, the court emphasized that Judge Harris had not exercised improper control over the treatment of the felon after imposition of sentence or intervened favorably on his behalf in the parole process. *Id.* at 1141 n.7. *See also* Comm'n on Jud. Performance v. Milling, 651 So. 2d 531, 536 (Miss. 1995) ("A justice court judge openly living with a fugitive from another state charged with several drug related felonies without a doubt creates an 'appearance of impropriety.'"); In re Jones, 581 N.W.2d 876 (Neb. 1998) (removal for, in addition to other misconduct, having close contacts with people the judge had placed on probation).

[92] In re Blackman, 591 Aid 1339 (N.J. 1991).

the felon, a former local official, and characterized the event as a going-away party.[93]

The New Jersey Supreme Court concluded that the judge's attendance at the picnic "could be perceived as evidencing sympathy for the convicted individual or disagreement with the criminal justice system that brought about the conviction," noting "such conduct may raise questions concerning the judge's allegiance to the judicial system" and "generate legitimate concern about the judge's attitude toward judicial responsibilities, weakening confidence in the judge and the judiciary."[94] Acknowledging that the judge did not act with an improper motive, the court stated the judge's "presence at the party was the subject of public scrutiny, not his feelings of friendship.[95]

> As a judge, respondent had a duty to foresee that his actions might be open to criticism by the press or members of the public. Even if such criticism might be a misinterpretation of his motives, respondent nonetheless had an obligation to avoid any conduct that might lead to such criticism. By putting his personal feelings ahead of his responsibility as a judge and attending the party, respondent conducted himself improperly and exhibited insensitivity and poor judgment. He conveyed the wrong image of the judiciary.[96]

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[93] *Id.* at 1342.

[94] *Id.* at 1341-42.

[95] *Id.* at 1342.

[96] *Id.*

The "going away" party was in 1990, six months after the court had publicly reprimanded two judges for attending the Governor's Inaugural Ball with their spouses, two years after the New Jersey Advisory Committee on Extra-Judicial Activities had issued an opinion warning judges not to attend a dinner to honor a prosecutor on his or her reappointment, and fifteen years after a judge had been sanctioned for frequently being a luncheon guest of attorneys in pending matters. In light of those authorities the court stated, Judge Blackman should have known that "a judge who attends a public or social event will be perceived as endorsing or supporting not only the event itself but also persons associated with the event."[97]

E. Statements: "Just Kidding"

The appearance of impropriety standard has been used to foil a judge's attempt to negate the obvious import of a statement that casts doubt on the basis on which the judge reached a decision.

In *In re Best*,[98] for example, the judge, in a case in which a defendant charged with battery was representing himself, asked the courtroom audience, "If you think I ought to find him not guilty, will you stand up?"[99] Then, he asked, "If you think I ought to find him guilty, stand up."[100] The judge then found the defendant guilty.[101]

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[97] *Id.*

[98] 719 So. 2d 432 (La. 1998).

[99] *Id.* at 434.

[100] *Id.*

[101] *Id.*

Conceding that he should not have asked the audience to vote, the judge argued that his conduct was not sanctionable because his guilty verdict was based on the evidence presented at trial and he had only wanted to "involve the public in the judicial process."[102] In fact, no one in the audience had stood up after either request by the judge.[103] Rejecting the judge's argument, the Louisiana Supreme Court stated

> [w]hether or not Judge Best actually based his verdict on the audience's vote does not determine whether or not his conduct is sanctionable. The mere fact that he asked the courtroom audience to vote on the guilt of the defendant gave the impression that Judge Best based his verdict on something other than the evidence presented at trial. This type of behavior destroys the credibility of the judiciary and undermines public confidence in the judicial process.[104]

In re Schiff[105] also involved statements by a judge that suggested he was making a decision based on something other than the facts or the law. A part-time judge who also practiced law had dismissed traffic charges filed against the driver of a car who had been in an auto accident with Judge Schiff.[106] After learning of the dismissal, Judge Schiff remarked to the arresting officer, "It's a wheel. It goes around and maybe someday I can do the same for

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[102] *Id.* at 435.

[103] *Id.*

[104] *Best,* 719 So. 2d at 435-36; *see also* In re Daniels, 340 So. 2d 301 (La.1976) (censure for giving the appearance of deciding the guilt or innocence of several defendants by flipping a coin).

[105] 635 N.E.2d 286 (N.Y 1994).

[106] *Id.* at 287.

him."[107] Judge Schiff also told an attorney he was so angry at the part-time judge that he intended to grant the plaintiff's motion for judgment in a case in which the defendant was represented by the part-time judge's law firm.[108] The judge did grant judgment for the plaintiff but argued in discipline proceedings that he had done so on the merits.[109] The New York Court of Appeals concluded that argument was "largely irrelevant to the charge. . . ."[110] The court stated that

> the harm inured when he indicated he would use his judicial powers to satisfy a personal vendetta, a classic instance in which "an appearance of such impropriety is no less to be condemned than is the impropriety itself." Petitioner created the impression that he was using his judicial office to retaliate, and thus failed to avoid the appearance of impropriety and to conduct himself in a manner that promotes public confidence in the impartiality and integrity of the judiciary.[111]

Similarly, in *In re Cunningham*,[112] the New York Court of Appeals censured a county court judge who had told a city court judge in a letter that he would never change a sentence the city court judge had imposed, stating: "You can do whatever you want to whenever you want to & I'll agree with you . . . I take the position that you know the

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[107] *Id.*

[108] *Id.* at 288.

[109] *Id.*

[110] *Id.*

[111] *Schiff*, 635 N.E.2d. at 288 (quoting In re Spector, 392 N.E.2d 552, 554 (N.Y. 1979)). The judge was removed for this and other misconduct.

[112] 442 N.E.2d 434 (N.Y. 1982).

case and as sentencing judge you can do whatever you damn well please."[113]

Emphasizing that a judge must view matters on their merits alone without regard to public or professional disapproval, the court stated that a judge must also avoid creating the appearance that he or she "would decide a matter before him in any other manner."[114] Noting the record did not indicate that Judge Cunningham "actually abrogated his appellate duty to review matters before him on the basis of their merits alone," the court concluded that, regardless whether Judge Cunningham was influenced by his concern about the other judge's criticism, his letter constituted judicial misconduct because he created "the appearance that he might be prejudging certain matters."[115]

After sentencing in a drunk-driving case, a California judge evaluated the deputy district attorney's performance, telling her she had done well but needed to be prepared to adjust her strategy after an unanticipated

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[113] *Id.* at 435. When Judge Cunningham learned that the city court judge was upset that he had signed an order to show cause in a case, he wrote a second letter stating that "if I catch the appeal, I will affirm, as always, on a judge's discretion." *Id.*

[114] *Id.*

[115] *Id.* at 436. Judge Cunningham had in fact overturned one of the city judge's sentences on appeal. *Id.* Judge Cunningham was censured. *See also* In re Mulroy, 731 N.E.2d 120, 122-23 (N.Y. 2000) (a judge's statement that Utica was a "fucking black hole" and he wanted to get back to Syracuse because it was "men's night out" created the appearance that he was pressuring the prosecutor to agree to a plea bargain even if it was, as he claimed, "banter;" the judge was removed for this and other misconduct).

ruling.[116] Referring to his exclusion of the defendant's pre-field sobriety statements, the judge stated that he knew that the statements were admissible but kept them out to see how the young prosecutor would handle herself.[117] The California Commission on Judicial Performance found that the judge's statement gave the appearance that he had decided a legal issue to teach a lesson to a new lawyer, noting that the judge failed to appreciate how his choice of words implicitly suggested that his ruling was questionable if not wrong.[118]

Finally, based on a stipulation and agreement, the Washington Commission reprimanded a judge for writing "NTG" on hundreds of defendants' judgment and sentence forms, generally understood to be an acronym for "Nail This Guy."[119] The judge maintained that "NTG" meant "Note This Guy (or Gal)," and that he used the initials as a private method to remind him of which cases he believed deserved closer scrutiny should he be required to review that person's sentence following a reported violation of sentencing condition.

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[116] Inquiry Concerning VonVoorhis, Decision and Order (Cal. Comm'n on Jud. Performance Feb. 27, 2003) *at* http:cjp.ca.gov/CN%20removals/VanVoorhis%202-27-03.rtf.

[117] *Id.*

[118] *Id.* The Commission removed the judge for this and ten additional instances of improper courtroom demeanor. *Id. See also* In re Smith, Determination (N.Y. State Comm'n on Jud. Conduct June 26, 1998) *at* http://www.scjc.state.ny.us/determinations/s/smith,m.htm (a judge created the appearance of bias against the prosecution by engaging in ill-placed humor, minimizing charges before her, and making remarks concerning the reliability of prosecution witnesses.)

[119] In re Burns, Stipulation, Agreement, and Order of Reprimand (Wash. State Comm'n on Jud. Conduct June 8, 2004) *at* www.cjc.state.wa.us.

The judge acknowledged, however, that it was widely rumored among court employees and attorneys who practiced in his court that the initials meant "Nail This Guy" and that he contributed to that rumor by making statements to others that would cause them to believe that was what the letters stood. Although the objective evidence did not establish actual bias or prejudice or that the judge prejudged a particular case, the judge acknowledged that some parties, counsel, and staff could have understood that he had prejudged cases and intended to treat some defendants harshly, cruelly, or inappropriately in the future. The agreement stated

> [t]he Code of Judicial Conduct deals not only with subjective intent, but also with appearances. Whatever Respondent may have intended "NTG" to mean, his words and conduct led others to believe "NTG" meant "Nail This Guy." By writing "NTG" on some defendants' judgment and sentence forms, generally understood to be an acronym for "Nail This Guy," Respondent created the appearance he was biased or prejudiced against those individuals he intended to "nail." Public confidence in the integrity and impartiality of the judiciary is undermined when a judge's conduct creates the perception that a case has been pre-judged or that there is a bias against a party, regardless of whether the perceived bias or prejudice exists. Persons who believed Respondent wrote "Nail This Guy" in code on some defendants' judgments could reasonably conclude that those defendants received, or would receive, disparate or unfair treatment from the court.

F. Manifestations of Bias

An Illinois judge, during one of several intemperate exchanges, said "when I'm talking to you boy, you look at me," to an adult African-American defendant in a criminal case.[120] The judge admitted that this was discourteous but denied that it was a manifestation of bias, arguing he did not say "boy" with any racial intent or to demean the defendant.[121] The judge presented over one hundred letters from people who knew him in his professional capacity stating they had never heard him make a racially biased remark.[122]

The Illinois Courts Commission acknowledged that the term "boy" directed at an African American was offensive but found that "the term itself is not objectively racist and thus does not necessarily indicate racial bias or prejudice."[123] Therefore, it concluded that the Judicial Inquiry Board had not proved that the judge had manifested bias or prejudice in the exercise of his judicial duties.[124]

In contrast, in *In re Ellender*,[125] the Louisiana Supreme Court considered whether a white judge's appearance in black face at a party created an appearance of bias

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[120] In re Golniewicz, Order (Ill. Courts Comm'n Nov. 14, 2004).

[121] *Id.*

[122] *Id.*

[123] *Id.*

[124] *Id.* The Commission removed the judge from office for this instance and two additional instances of intemperate conduct and using his parents' address to run for office when his permanent abode was outside the sub-circuit in which he was running. *Id.*

[125] 889 So. 2d 225 (La. 2004).

even absent evidence the judge was prejudiced in his decision-making. Judge Ellender had attended a Halloween party at a restaurant dressed in an orange prison jumpsuit and handcuffs, black face, and a black afro wig.[126] Most of the people at the restaurant were party guests, but there were five or six additional diners; the restaurant remained open for take out, and the staff of the restaurant, including an African-American employee, was also present.[127] Apparently, one of the witnesses reported the incident to the local newspaper, and on November 9, there was an article entitled "Local judge's masquerade sparks racial concerns."[128] Local broadcast media picked up the story, followed by CNN and two New Orleans television stations.[129] The local office of the NAACP received calls complaining about the judge's Halloween masquerading.[130] The Judiciary Commission received six complaints, including complaints filed by the NAACP, the judge's colleagues on the bench, and one of the justices of the Louisiana Supreme Court.[131]

The judge admitted the factual allegations and agreed that he had violated Canons 1 and 2A, which require a judge to uphold the integrity and independence of the judiciary and require that a judge shall respect and

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[126] *Id.* at 227. The choice of costumes was intended to be humorous by implying that the judge's new wife, who reportedly was young and attractive and was dressed as a police officer, had her husband under her control. *Id.*

[127] *Id.*

[128] *Id.*

[129] *Id.*

[130] *Id.* at 227-28.

[131] *Ellender*, 889 So. 2d at 228.

comply with the law, but did not agree that that his conduct was demeaning towards African-Americans. The district attorney's office reviewed the judge's docket but did not find any disparity in the judge's sentencing based on race.[132] Four African-Americans testified before the Commission that Judge Ellender is a good judge whom they consider fair and impartial.[133]

The Louisiana Supreme Court agreed with the Commission's finding that the judge's conduct "called into question his ability to be fair and impartial towards African-Americans who appear before his court as defendants in criminal proceedings, as well as towards any African-American litigant or attorney in any proceeding before him, thereby creating the appearance of impropriety."[134] Although agreeing that the judge did not intend to offer an affront to the African-American community, the court concluded that "his behavior exhibits his failure to appreciate the effects of his actions on the community as a whole."[135]

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[132] *Id.* at 232.

[133] *Id.*

[134] *Id.* at 229.

[135] *Id.* at 233. The court suspended the judge without pay for one year but deferred six months of the suspension on the condition that the judge enroll in a course at one of the local universities that will allow him "to gain insight into the attitude of other racial groups, particularly racial groups where interrelations are marked by antagonism, discrimination and conflict." *Id. See also* In re Sardino, 448 N.E.2d 83 (N.Y. 1983) (referring to defendants as "creatures," calling one defendant a "maniac," and similar statements at arraignment "could only create the impression in the mind of the public that [the judge] was predisposed against those defendants who appeared before him if not defendants generally" even if he did not actually harbor any bias); In re Schenck, 870 P.2d 185, 198 (Or. 1994) (off-bench statements

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IV. THE TEST

The commentary to Canon 2 of the ABA Model Code of Judicial Conduct states that "the test for appearance of impropriety is whether the conduct would create in reasonable minds a perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality and competence is impaired."[136] Similar iterations are "whether a person aware of the facts might reasonably entertain a doubt that the judge would be able to act with integrity, impartiality, and competence,"[137] whether a reasonable person would question the impartiality of the court,[138] and whether the conduct would "have a negative effect on the confidence of the thinking public in the administration of justice."[139] A finding of an appearance of impropriety is

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about a prosecutor such as "she has placed herself in a position for which she has neither the training or experience to perform the duties competently" created the impression that the judge would be biased in favor of the state in order to make up for the alleged incompetence of the district attorney). *But see* In re Nakoski, 742 A.2d 260 (Pa. Ct. Jud. Dis. 1999) (finding a judge did not commit misconduct when, in response to the question "It's not unlawful or illegal to be a black man, is it?" asked in a continuing education program, the judge said "Yes" and "They're all in jail. They're the ones doing all the robberies and burglaries").

[136] Canon 2A (1990). *See, e.g.*, In re O'Bier, 833 A.2d 950, 957 (Del. Ct. Jud. 2003) (by displaying a weapon in a way that made two court clerks feel their safety was threatened and persistently carrying his weapon while at work in a way that the weapon was clearly visible to the public and employees, a judge created "the perception that his ability to carry out his judicial responsibilities with integrity, impartiality and competence was impaired").

[137] Cal. Code of Jud. Ethics, Canon 2A. cmt.

[138] In re Snow, 674 A.2d 573, 577 (N.H. 1996).

[139] In re Bonin, 378 N.E.2d 669, 683 (Mass. 1978).

often based on a combination of factors and the cumulative effect of the circumstances.[140]

In a literal approach to the appearance of impropriety standard, judicial discipline cases often start with the improprieties defined in the code[141] and then proceed if an actual violation is not proven to consider whether an appearance of a violation was created. In other words, if "notwithstanding the absence of proof of any actual or intended impropriety," whether the judge's conduct "inescapably created a circumstantial appearance of impropriety."[142] Similar pronouncements of the rule provide that an appearance of impropriety is established if a reasonable person would be justified in suspecting that the judge violated the code,[143] in having an "undispelled suspicion" of actual impropriety,[144] or in believing that "an impropriety is afoot."[145]

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[140] *See, e.g., supra* discussion of In re Ray at text accompanying notes 65-69 and In re Johnstone at text accompanying notes 50-56.

[141] Commentary to Canon 2A provides that "actual improprieties under this standard include violations of law, court rules or other specific provisions of this Code."

[142] In re Spector, 392 N.E.2d 552, 555 (N.Y.1979).

[143] In re Chaisson, 549 So. 2d 259, 263 (La 1989).

[144] In re Johnstone, 2 P.3d 1226, 1237 (Alaska 2000).

[145] In re Inquiry Concerning a Judge, 788 P.2d 716, 723 (Alaska 1990). The most expansive definition of the standard explains:

> Because conduct that necessitates a full-scale inquiry to allay public suspicion itself suggests impropriety, an impermissible appearance also might be found – regardless of whether an investigation eventually dispelled suspicion of actual misconduct – if readily avoidable conduct foreseeably caused reasonably intelligent and informed members of the public to demand a full inquiry into suspected impropriety.

In re Johnstone, 2 P.3d 1226, 1237 n.38 (Alaska 2000).

For example, an actual impropriety in *Kennick v. Commission on Judicial Performance*[146] would have been proven if one of the attorneys with whom the judge met alone in chambers admitted that they had had ex parte communications about the case in which they were appearing that day on the judge's calendar. Even absent that direct evidence of ex parte communications, however, the California Supreme Court found that the judge's practice of having social visits with two favored attorneys on days when they were appearing in his court gave rise to an appearance of impropriety, in other words, an appearance of ex parte communications.[147]

A crucial element of the appearance of impropriety standard as interpreted by the judicial discipline authorities is the consideration of whether the conduct was readily avoidable,[148] in other words, whether there were reasonable precautions the judge could have taken to avoid creating the appearance of impropriety.[149] For example, in *In re*

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[146] 787 P.2d 591 (Cal. 1990).

[147] *Id.* at 609-10. *See also* In re Slusher, Stipulation, Agreement, Order of Admonishment (Wash. Comm'n on Jud. Conduct Apr. 1, 1994), *at* http://www.cjc.state.wa.us/case%20material/1994/1518%20stipulation.pdf (finding a violation of code of judicial conduct where a judge engaged in a casual and cordial conversation in the courtroom with one of the parties in a case that the other party observed, while the attorneys for both parties were discussing settlement outside the courtroom even though there was no evidence that the judge discussed the proceeding); In re Huttner, Determination (N.Y. State Comm'n on Jud. Conduct July 5, 2005) *at* http://www.scjc.state.ny.us (even if a judge and attorney did not discuss the merits of the case the attorney was handling before the judge during their out-of-court meetings, the appearance of impropriety was inevitable, compounded by the judge's eleven fiduciary appointments to the attorney).

[148] *Johnstone*, 2 P.3d at 1237 n.38.

[149] In re Inquiry Concerning a Judge, 788 P.2d at 723.

Bonin,[150] the Massachusetts Supreme Judicial Court held that the chief justice of a superior court had created an appearance of impropriety by failing to make inquiries about a meeting he was planning to attend at which Gore Vidal would be speaking on "Sex and Politics in Massachusetts."[151] If the judge had made those inquiries, he would have learned that the meeting was a fund-raiser to benefit defendants in criminal cases, alleging sex acts between men and boys, in the court in which he was chief justice although the cases were not assigned to him.[152]

The court noted that it would be an impropriety for a judge to attend a meeting knowing that the proceeds "were to be used as a defense fund or knowing that pending cases would be the subject of partisan comment."[153] Therefore, the court concluded, "it was likewise an impropriety, although a lesser one, for the Chief Justice, in his impatience or rashness, to fail to take heed of information and warnings which would have brought more definite knowledge to him if he had considered or pursued them seriously."[154] Similarly, an appearance of impropriety could have easily been avoided if Judge Ellender had gone to the

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[150] 378 N.E.2d 669 (Mass. 1978).

[151] *Id.* at 685.

[152] *Id.* A newspaper had carried a picture of the chief justice at the meeting on the front page with a headline, "Bonin at benefit for sex defendants." *Id.* at 680. The newspaper had a story and, on page three, a picture of the chief justice with Gore Vidal. *Id.* At the meeting, there was also discussion of the pending cases, the harassment of gay people by the district attorney and the police, and the current "witchhunt" and "show trials." *Id.* at 679.

[153] *Id.* at 682.

[154] *Id.* The judge was censured for this and other misconduct. *Id.* at 685.

Halloween party in a Spiderman costume,[155] if Judge Adams had returned the sweater from the car dealer,[156] if Judge Feinberg had read and followed (not just "skimmed") the Surrogate's Court Procedure Act,[157] or if Judge Mosley had used personal stationery in his letter to his son's school.[158]

The model code does not describe the reasonable person who is the subject of the appearance of impropriety test. Cases have described the reasonable person as "a reasonably intelligent and informed member of the public,"[159] "an objective observer,"[160] and "the average person encountered in society."[161] Other formulations emphasize what a reasonable person is not: not the judge himself or herself,[162] not a well-trained lawyer,[163] not a highly sophisticated observer of public affairs,[164] and not a cynic skeptical of the government and the courts.[165] Perhaps the most evocative variation characterizes the reasonable person as

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[155] *See supra* discussion of *In re Ellender* at text accompanying notes 125-35.

[156] *See supra* discussion of *Adams v. Comm'n on Jud. Performance* at text accompanying notes 80-90.

[157] *See supra* discussion of *In re Feinberg* at text accompanying notes 62-64.

[158] *See supra* discussion of *In re Mosley* at text accompanying notes 42-43.

[159] *Johnstone*, 2 P.3d at 1237 n.38.

[160] *Adams*, 897 P.2d at 548.

[161] *Inquiry Concerning a Judge*, 822 P.2d at 1340.

[162] *Snow*, 674 A.2d at 577 (quoting *Blaisdell v. City of Rochester*, 609 A.2d 388, 390 (N.H. 1992)).

[163] *Inquiry Concerning a Judge*, 822 P.2d at 1340.

[164] *Id.*

[165] *Id.*

"neither excessively indulgent, nor excessively jaundiced."[166]

Further, the reasonable person would not be "uninformed or misinformed,"[167] and the perception of an impropriety must be based on more than vague conjectures and subtle innuendo.[168] Realistically, however, a reasonable person could not know "every conceivably relevant fact"[169] but would know "all available information,"[170] "all the relevant circumstances that a reasonable inquiry would disclose,"[171] or the "totality of circumstances."[172]

One factor the reasonable person could not be presumed to know is the judge's subjective motive or state of mind.[173] Thus, "whatever [the judge's] motive, it is no cure for conduct that creates an appearance of impropriety."[174] A judge's explanation for his or her conduct "may shed light

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[166] In re Larsen, 616 A.2d 529, 584 (Pa. 1992).

[167] *Id.* at 582.

[168] *Id.* at 584.

[169] *Inquiry Concerning a Judge,* 822 P.2d at 1340. *But see* CAL. CODE OF JUD. ETHICS, Cannon 2A cmt. ("The test for the appearance of impropriety is whether a person aware of the facts might reasonably entertain a doubt that the judge would be able to act with integrity, impartiality, and competence").

[170] *Johnstone,* 2 P.3d at 1237 n.38.

[171] DEL. CODE OF JUD. CONDUCT, Canon 2A cmt. ("The test for appearance of impropriety is whether the conduct would create in reasonable minds, with knowledge of all the relevant circumstances that a reasonable inquiry would disclose, a perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality and competence is impaired.")

[172] *Larsen,* 616 A.2d at 584.

[173] *Blackman,* 591 A.2d at 1341.

[174] *Snow,* 674 A.2d at 578.

on his after-the-fact, subjective belief," but it does nothing to eliminate the appearance arising from the objective record.[175] For example, a reasonable person could not know whether Judge Golniewicz was actually unbiased when he called an African-American defendant "boy,"[176] whether Judge Gerard was actually able to overlook his sexual relationship with the prosecutor when he ruled in her cases,[177] or whether Judge Johnstone actually would have thought the person he chose was the best person for the coroner position even if the chief justice had not suggested the candidate.[178]

Similarly, a reasonable person would not know the subjective state of mind of other persons implicated in the judge's conduct. For example, a reasonable person could not know whether the charges against Judge Pennington's son would have been dismissed even if the judge had not met with the prosecutor[179] or whether the car dealer would have given the same deals he gave to Judge Adams to someone who had not just entered a multi-million dollar judgment in his favor.[180]

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[175] *Johnstone,* 2 P.3d at 1237.

[176] *See supra* discussion of *In re Golniewicz* at text accompanying notes 120-24.

[177] *See supra* discussion of *In re Gerald* at text accompanying notes 70-74.

[178] *See supra* discussion of *In re Johnstone* at text accompanying notes 50-56.

[179] *See supra* discussion of *In re Pennington* at text accompanying notes 30-32.

[180] *See supra* discussion of *In re Adams* at text accompanying notes 79-89.

Moreover, if a judge's conduct is not public, suspicions are more reasonable and an appearance of impropriety more likely because what actually happened cannot be known by the reasonable person and the absence of misconduct would have to be taken on faith. For example, because the conversations took place in private, whether Judge Kennick was actually discussing cases with the attorneys in his chambers[181] or whether Judge Chaisson really pressed for a favorable settlement[182] is inherently unknowable by the reasonable person and, therefore, irrelevant to the question whether there was an appearance of impropriety.

V. CRITICISM OF THE STANDARD

A. Chilling effect

The argument that the appearance of impropriety standard "chills courageous and innovative judicial decision-making"[183] is contradicted by the case-law. The cases in which a judge has been disciplined for a legal error or abuse of discretion (which are exceptions to the usual rule that mere legal error does not constitute misconduct[184]) do not rely on the Canon 2 appearance language. Instead, those cases are based on the Section 2A requirement that a judge "respect and comply with the law," the Section

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[181] *See supra* discussion of *In re Kennick* at text accompanying notes 146-47.

[182] *See supra* discussion of *In re Chaisson* at text accompanying notes 33-39.

[183] APRL comments, *supra* note 13.

[184] *See* Cynthia Gray, *The Line Between Legal Error and Judicial Misconduct: Balancing Judicial Independence and Accountability*, 32 HOFSTRA L. REV. 1245 (2004).

3B(2) injunction "to be faithful to the law and maintain professional competence in it," or the Section 3B(7) obligation to "accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law." Moreover, as the previous discussion of the case-law demonstrates, none of the cases applying the appearance of impropriety standard are based on the substance of a judge's decision but on surrounding conduct that makes it harder to accept the integrity of that decision.

Furthermore, the element of the test that permits a finding only when the judge did not use reasonable care to prevent an appearance of impropriety ensures that the standard cannot be applied to sanction a judge for the substance of a decision. In cases in which a judge is "duty-bound to take actions or make rulings that will predictably stir public controversy, . . . duty certainly must prevail over appearance: when duty requires a judge to take controversial action, it would be logically untenable and morally repugnant to suggest that the judge should be sanctioned merely because the action raises a public clamor."[185]

B. Vagueness

The primary attack on the appearance of impropriety standard is that the language is unconstitutionally vague and overbroad.[186] Reservations about the standard expressed

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[185] *Johnstone*, 2 P.3d at 1237.

[186] APRL argues that the standard places "judges at risk of disciplinary action depending upon the whim of judicial disciplinary authorities." APRL comments, *supra* at note 13. That accusation is grossly unfair to judicial disciplinary authorities, the commissions

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before the standard was first adopted in 1972, however, are not persuasive because subsequent experience has disproved their premise.[187] In light of the tests, limits, and definitions applied by the commissions and courts in the discipline cases in the past thirty years, the "appearance of impropriety" language would survive a vagueness challenge. A "statute or rule is not unconstitutionally vague merely because it does not specifically designate the various different means by which it is violated."[188] Rules setting guidelines for members of a profession such as lawyers and judges "need not meet the precise standards

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comprised of experienced attorneys, respected lay community leaders, and judges who are normally accused of being too soft on judges, not capriciously hard. Further, the final authority in state judicial discipline cases (in all but a few states) is the state supreme court, not an arbitrary body subject to fads and quirks. The risk to judges posed by the appearance of impropriety standard is apparently slight as APRL does not cite any cases it considers to be an unfair application of the standard although judges have allegedly been subject to the "whim" of judicial disciplinary authorities since at least 1972. In fact, of the over 30,000 states court judges in the United States, in 2004, for example, only eighteen judges (or former judges) were removed from office (ten additional judges resigned in lieu of discipline pursuant to agreements with judicial commissions that were made public) and only eighty-six additional judges (or former judges) were publicly sanctioned. Most of those cases did not involve findings of an appearance of impropriety but of an actual violation of the different sections of the code. While those statistics do not prove the commissions are ineffective, neither do they give any support for the argument that the commissions and courts are enforcing the appearance of impropriety standard (or indeed any provision of the code) in a capricious or draconian fashion.

[187] APRL cites the 1969 comments of former United States Supreme Court Justice Arthur Goldberg that Canon 2 is "unbelievably ambiguous." *Nonjudicial Activities of Supreme Court Justices and Other Federal Judges: Hearings on S. 1097 and S. 2109* Before the Subcomm. o. Separation of Powers of the Senate Comm. on the Judiciary, 91st Congress (1969).

[188] In re McGuire, 685 N.W.2d 748, 762 (N.D. 2004).

of clarity that might be required of rules of conduct for laymen."[189] Application of a vagueness analysis depends on the context, and judges, like lawyers, are professionals who have the benefit of guidance provided by case law, court rules, the "lore of the profession,"[190] "the traditions of the judicial profession," and "its established practices."[191]

"[N]ecessarily broad standards of professional conduct" are constitutionally permissible if they reflect the fundamental principle of professional responsibility.[192] Under this analysis, the rule defining attorney misconduct to include "conduct prejudicial to the administrative of justice"[193] – a phrase no more precise than "the appearance of impropriety" – has been to held to meet due process requirements.[194]

Moreover, the necessarily general provisions of the code of judicial conduct[195] have withstood vagueness challenges. In *In re Hill,*[196] for example, the Missouri

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[189] In re Keiler, 380 A.2d 119, 126 (D.C. 1977).

[190] Howell v. State Bar of Texas, 843 F.2d 205, 208 (5th Cir. 1988) (quoting In re Snyder, 472 U.S. 634, 645 (U.S. 1985)).

[191] Committee on Legal Ethics of the West Virginia State Bar v. Douglas, 370 S.E.2d 325, 328 (W.V. 1988).

[192] In re Charges Against NP, 361 N.W.2d 386, 395 (Minn. 1985) (quoting In re Gillard, 271 N.W.2d 785, 809 n.7 (Minn. 1978)).

[193] Model Rules of Prof'l Conduct R. 8.4(d) (2003).

[194] *NP,* 361 N.W.2d at 395; *Keiller,* 380 A.2d at 126 (D.C. 1977); *Douglas,* 370 S.E.2d at 328 (W.V. 1988); *Howell,* 843 F.2d at 208 (5th. Cir. 1988); In re Stanbury, 561 N.W.2d 507, 512 (Minn. 1997).

[195] Commentary to Canon 2 explains that "because it is not practicable to list all prohibited acts, the proscription is necessarily cast in general terms that extend to conduct by judges that is harmful although not specifically mentioned in the Code."

[196] In re Hill, 8 S.W. 3d 578 (Mo. 2000).

Supreme Court rejected the judge's argument that Section 2A and Section 2B did not give adequate notice of proscribed conduct and did not protect against arbitrary enforcement. (Section 2A provides: "A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." Section 2B provides: "A judge shall not lend the prestige of judicial office to advance the private interests of the judge or others; nor shall a judge convey or permit others to convey the impression that they are in a special position to influence the judge.")

The court noted that the "test for determining whether the Canons are vague is whether they convey to a judge a sufficiently definite warning of the proscribed conduct when measured by common understanding and practice."[197] The court stated that "neither absolute certainty nor impossible standards of specificity are required," especially in judicial discipline, where the purpose is "not to punish criminal conduct, but rather to maintain standards of judicial fitness."[198] The court also concluded that a judge was protected against arbitrary enforcement because violations of the canons were only evidence of misconduct and, ultimately, the court had to find that the judge violated the constitutional standard of misconduct before discipline could be imposed.[199]

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[197] *Id.* at 582.

[198] *Id.*

[199] *Id.* at 583. *See also* McGuire, 685 N.W.2d at 762 (rejecting arguments that Canons 1A, 2 and 3B(4) are unconstitutionally vague); In re Ritchie, 870 P.2d 967, 973 (Wash. 1994) (court's careful reading of Canons 1 and 2 led to rejection of judge's argument that he did not

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Similarly, in *In re Complaint Against Harper*,[200] the Ohio Supreme Court held that Section 2A and Section 7B(1)(a) "provided reasonable opportunity for regulated persons to know what conduct was prohibited, and were also explicit enough to prevent arbitrary enforcement, they are not subject to attack under the vagueness doctrine."[201] (Section 7B(1)(a) states, "An incumbent judge, or a candidate for judicial office should maintain the dignity appropriate to judicial office.") The court reasoned, "like the military, fire and police departments, and civil service, the judiciary is a specialized community governed by a specific discipline and body of rules."[202] The court also noted that "sanctions like public reprimands, that [sic] are applied for violation of the Canons of Judicial Ethics, are more civil or administrative than criminal."[203] Finally, the court stated

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know that mischaracterizing activities for which he sought reimburse was improper).

A federal district court did hold that the appearance of impropriety provision in Canon 2 as well as the general provisions in Canon 1 were unconstitutional, but that decision was vacated on appeal on abstention grounds. *Spargo v. New York State Comm'n on Jud. Conduct*, 244 F. Supp. 2d 72 (N.D. N.Y. 2003), *vacated*, 351 F.3d 65 (2d Cir. 2003). Even if the decision had not been vacated, the district court's analysis would be irrelevant; because the conduct at issue involved political activities, the district court applied a much stricter constitutional analysis than would ordinarily apply to a constitutional challenge to Canon 2. Moreover, the district judge's holding was premised on his belief that only "murder and mayhem, or bribery" "plainly denigrate the integrity and independence of the judiciary," an unsupportable assertion that indicates his decision that the canons violated due process was as ungrounded as his overturned decision that abstention was not required.

[200] 673 N.E.2d 1253 (Ohio 1996).

[201] *Id.* at 1264.

[202] *Id.*

[203] *Id.*

that "fair warning of the prohibited conduct existed" in an advisory opinion, pre-existing case law, custom, and usage.[204]

C. Difficulty

A review of the cases discussed above suggests that the problem is not that judges believed that a reasonable person would not think their conduct improper, but that they did not even try beforehand to consider a perspective other than their own. However, it has been argued that judges could not know what would violate the appearance of impropriety provision because it requires they, who do not stand outside the system, "imagine how a reasonable, well-informed observer of the judicial system would react."[205] As "a dispenser rather than a recipient or observer of decisions," this argument maintains, "the judge understands how professional standards and the desire to preserve one's reputation often enforce the obligation to administer justice impartially, even when an observer might be suspicious."[206] A related argument is that the

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[204] *Id.* In re Hey, 452 S.E.2d 24 (W.V. 1994), the West Virginia Supreme Court of Appeals held that the state's interests were sufficiently served by the specific prohibitions on judges' speech in the code and that the general prohibitions in Canons 1, 2, and 3 may not be used to punish judges for public remarks that do not violate either a specific prohibition or some other law. *Id.* However, the court stated, "This is not to say that Canons 1 and 2 are facially unconstitutional. . . ." *Id.* at 33.

[205] APRL comments, *supra* at note 13, quoting In re Mason, 916 F.2d 384, 386 (7th Cir. 1990). APRL neglects to quote the remainder of the analysis in which the court appears to credit judges' ability "to hold in mind that these outside observers are less inclined to credit judges' impartiality and mental discipline than the judiciary itself will be." *Id.*

[206] *Id.*

standard imposes an unfair stress on judges that "tends to undermine their own sense of worth."[207]

That argument suggests that judges have been elevated to such a lofty position that they can no longer conceive of the opinion of the reasonable non judge, reflecting an arrogance that most judges do not share and that corrodes public confidence in the judiciary. The appearance of impropriety standard provides a needed antidote to that arrogance by requiring judges to develop a habit of thought that considers an objective view. The reasonable person standard is familiar to judges from a variety of contexts, and while it may be difficult for them to imagine what a reasonable person might think, they should know that they at least have to try as a necessary corrective to the subjectivity of their own evaluation of their own conduct.

Further, judges are not without guidance in determining what creates an appearance of impropriety. Judges can and should turn to their colleagues, family, and friends for advice like most people do. Moreover, judges can refer to existing case-law and advisory opinions for guidance about what the reasonable person might think. Given the numerous cases on the topic, for example, no judge could claim surprise that gratuitously referring to the judicial office or using judicial stationery in private business creates an appearance of impropriety.

Moreover, there are judicial ethics advisory committees in most states and for federal judges that will advise a judge, either informally or in writing, whether the judge's

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[207] *Spector*, 392 N.E.2d at 558 (Fuchsberg, J., dissenting).

contemplated conduct is an impropriety or creates an appearance of impropriety. These opinions do not necessarily bind the judicial discipline authorities, but asking provides a judge with the perspective of the objective, reasonable persons who make up the committee and compliance with an opinion provides a good faith defense in disciplinary proceedings. When judicial stationery may appropriately be used, what gifts may be accepted, what functions are not appropriate to attend, whether to preside in a case involving an individual with whom a judge has a relationship, and whether to appoint a particular person are precisely the types of questions advisory committees frequently address.[208]

D. Comparisons to Standards for Lawyers

In 1969 the ABA Model Code of Professional Responsibility used "avoid the appearance of impropriety" as the title of a rule prohibiting a former government lawyer from accepting certain private employment and from stating or implying "that he is able to influence improperly or upon irrelevant grounds any tribunal, legislative body, or public official."[209] In addition, "avoid the appearance of impropriety" was one of the canons or "axiomatic norms" from which disciplinary rules were derived[210] and was

[208] *See* http://www.ajs.org/ethics/eth_advis_comm_links.asp.

[209] Model Code of Prof'l Responsibility DR 9-101 (1969).

[210] Model Code of Prof'l Responsibility Canon 9 (1969). In the Model Code of Professional Responsibility, canons are "statements of axiomatic norms, expressing in general terms the standards of professional conduct expected of lawyers in their relationships with the public, with the legal system, and with the legal profession. They embody the general concepts from which the Ethical Considerations and the Disciplinary Rules are derived." *Id.* at Preliminary Statement.

included in several "ethical considerations" or aspirational principles.[211] Accepting arguments that a more specific rule was needed, the ABA eliminated the appearance of impropriety standard when it replaced the Model Code of Professional Responsibility in 1983 with the Model Rules of Professional Conduct.[212]

Thus, one of the arguments used to support deleting the appearance of impropriety standard from the model code of judicial conduct is to bring the rules for judges in line with the rules for lawyers.[213] The easy and decisive answer to that argument is that judges should be held to higher ethical standards than lawyers. While lawyers may have a hard time balancing the beliefs of a reasonable person about impropriety with their obligation to be an advocate for a client, judges do not have that conflict because acting with an integrity that promotes public confidence in judicial decisions is their primary ethical responsibility. Moreover, it is a judge's job to apply general laws to specific facts, and it is not unfair to ask judges to aspire to avoid the appearance of impropriety and to sanction judges who fail to do so.

In addition, the reasons for deleting the standard from the Rules of Professional Responsibility do not apply to the

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[211] Model Code of Prof'l Responsibility EC 9-3, EC 9-6. In the Model Code of Professional Responsibility, ethical considerations "are aspirational in character and represent the objectives toward which every member of the profession should strive. They constitute a body of principles upon which the lawyer can rely for guidance in many specific situations." *Id.* at Preliminary Statement.

[212] *See* Bruce A. Green, *Conflicts of Interest in Legal Representation: Should the Appearance of Impropriety Rules be Eliminated in New Jersey – Or Revised Everywhere Else?* 28 SETON HALL L. REV. 315 (1977).

[213] *See* APRL comments, *supra* note 13.

code of judicial conduct. Comment 5 to the pre-Ethics 2000 version of Rule 1.9 explained that the appearance of impropriety standard was deleted because, under the standard, "disqualification would become little more than a question of subjective judgment by the former client."[214] However, the standard in the code of judicial conduct is the reasonable person standard, not a subjective standard. Comment 5 also argued that because "'impropriety' is undefined, the term 'appearance of impropriety' is question-begging."[215] In contrast, the code of judicial conduct does define impropriety; commentary to Canon 2 states that "[a]ctual improprieties under this standard include violations of law, court rules or other specific provisions of this Code."[216]

Finally, attempts to downgrade the appearance of impropriety language in the code of judicial conduct to only an insignificant, unenforceable title are unconvincing.[217] Canon 2 is a complete, declaratory sentence in contrast to the sentence fragments that comprise the titles in the Model Rules of Professional Responsibility. "A judge shall avoid impropriety and the appearance of impropriety in all of the judge's activities" is not comparable to "Competence," for example, the title of Rule 1.1 of the Model Rules. Moreover, the preamble to the model code makes no

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[214] *Id.*

[215] *Id.*

[216] Model Code of Prof'l Responsibility Canon 2.

[217] *See* Eileen C. Gallagher, The ABA Revisits the Model Code of Judicial Conduct 44 NO. 1 Judges' J. 7 (Winter 2005) ("Although the directive to avoid the appearance of impropriety has existed in the Model Code for decades, the provision has only been found in the canon's title, not in its individual sections").

reference to "titles" but expressly states that "the text of the Canons . . . is authoritative."

E. The Specter of *Spector*

In re Spector[218] is often cited in discussions of the appearance of impropriety standard, largely on the eloquence of the dissenting opinion. In that case, the New York Court of Appeals considered the conduct of a judge who had appointed the sons of two other judges as guardians ad litem, receivers, and referees while those other judges were appointing his son to similar positions.[219] The State Commission on Judicial Conduct had found that the judge was aware of the appointments of his son being made by the other judges although there was no "*quid pro quo*" understanding.[220]

The court stated "nepotism is to be condemned, and disguised nepotism imports an additional component of evil because, implicitly conceding that evident nepotism would be unacceptable, the actor seeks to conceal what he is really accomplishing."[221] The court concluded "participation in the pattern of cross appointments gave an appearance of impropriety, in effect permitting the inference that each of the Judges involved was by this means securing appointments for his own son."[222] The court stated, "Notwithstanding the

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[218] 392 N.E.2d 552 (N.Y. 1979).

[219] *Id.* Judge Spector had appointed the Judge Fine's son while Justice Fine appointed Judge Spector's son eight times. Judge Spector appointed Judge Postel's son ten times while Justice Postel appointed Judge Spector's son five times. *Id.* at 552-53.

[220] *Id.* at 553.

[221] *Id.*

[222] *Id.* at 554.

absence of proof of any actual or intended impropriety there was thereby inescapably created a circumstantial appearance of impropriety."[223]

The dissenting justice did not object to the Commission's enforcement of the appearance of impropriety standard "where appropriate,"[224] although noting "the need to invoke the canon with great restraint."[225] The dissent stated that "[u]nderstandably, no Judge can respond with less than pride to the flattering proposition that more may be expected of Judges than of ordinary mortals."[226] The dissent argued, however, that the "'appearance of impropriety' concept is beset by legal and moral complexity. The concern is with what can be a very subjective and often faulty public perception."[227]

> Indeed, lack of specificity as to what conduct makes a Judge vulnerable to a charge of appearance of impropriety may bear serious due process implications. Leaving the rules expected to be observed unidentified is bound to burden our Judges with uncertainty as to whether what is acceptable today will be deemed aberrant tomorrow. Putting men and women who have to judge the rights of others under such undeserved stress tends to undermine their own sense of worth. Our legal system should treat those who preside over it with more regard.[228]

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[223] *Id.* at 555. The judge was admonished.

[224] *Spector*, 392 N.E.2d at 556 (Fuchsberg, J., dissenting).

[225] *Id.* at 555 (Fuchsberg, J., dissenting).

[226] *Id.* (Fuchsberg, J., dissenting).

[227] *Id.* (Fuchsberg, J., dissenting).

[228] *Id.* at 557 (Fuchsberg, J., dissenting).

The focus of the dissent's disagreement with the majority was that there was no specific rule prohibiting judges from appointing other judges' family members, and custom allowed the personal preferences of the appointing judge to govern the selection of referees, guardians ad litem, and others.

> To apply a current perception of impropriety retrospectively as the basis for the finding that acts that were once regarded as proper when performed are now to be classified as improper is fundamentally wrong. To do so exacts from the petitioner expiation for the legal community's failure to have articulated and imposed a clearer standard in the past.[229]

However, the crux of the majority opinion was not that Judge Spector had appointed the other judges' sons,[230] but that his appointments in combination with their appointments of his son would make reasonable people believe that the three judges had agreed to avoid the restriction on nepotism by a *Strangers on a Train* maneuver.[231] Even assuming there was no agreement or unspoken understanding, Judge Spector knew of the other judges' appointments of his son and, therefore, should have known

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[229] *Id.* at 556 (Fuchsberg, J., dissenting).

[230] Judges are in fact allowed to appoint other judges' family members in cases. *See* New York Advisory Opinion 03-19, *at* http://www.nycourts.gov/ip/judicialethics/Opinions/03-119_.htm.

[231] In Alfred Hitchcock's classic 1952 movie, Bruno agrees to kill Guy's wife while Guy agrees to kill Bruno's father (at least Bruno thinks Guy agreed to do so). Because Bruno and Guy have no connection with each other, other than the chance encounter on the train, and neither has any connection to the person they plan to kill. Bruno figures each will be rid of a burden without the police being able to tie either to the crimes.

that an appearance of cross nepotism would be created if he appointed their sons. The appearance could easily have been avoided; the judge could simply have appointed other attorneys.

The majority responded to the dissent's arguments:

> Reluctance to impose a sanction in this case would be taken as reflecting an attitude of tolerance of judicial misconduct which is all too often popularly attributed to the judiciary. To characterize the canonical injunction against the appearance of impropriety as involving a concern with what could be a very subjective and often faulty public perception would be to fail to comprehend the principle. The community, and surely the Judges themselves, are entitled to insist on a more demanding standard. . . . It would ill befit the courts and the members of the judiciary to suggest that Judges are to be measured against no higher norm of conduct than may at times and in some places unhappily have been perceived as reflecting the mores of a judicial marketplace.[232]

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[232] *Spector*, 392 N.E.2d at 555. Even if the majority's decision is seen as cynical, that cynicism has been more than borne out in the years after the decision in *Spector* by the chronic scandals involving fiduciary appointments in New York that have resisted numerous reforms. *See Fiduciary Appointments in New York*, A Report to Chief Judge Judith S. Kaye and Chief Administrative Judge Jonathan Lippman (Dec. 2001), *available at* http://www.courts.state.ny.us/ip/gfs/igfiduciary.html.

VI. CONCLUSION

Holding judges to the highest standards of conduct is not flattery but their part of the bargain in which the public has granted them independence. At a time when judges are accused of being unaccountable, the judiciary must be answerable to the public's ethical expectations. To counteract accusations of arrogance, judges must be humble in ethical matters and eschew any claims of entitlement. At a time when judges are defending their freedom to make decisions regardless of clamor by the public or pressure from politicians, judges must demonstrate their commitment to maintaining public confidence in the integrity and impartiality of those decisions by considering how the public might reasonably view their conduct. The appearance of impropriety standard, both as a symbol and an enforcement tool, is an essential component of that effort and perfectly comprehensible by a thoughtful judge and readily embraced by an upright judge.